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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1177

THE FLUOR CORPORATION, LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION and GENERAL REINSURANCE CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA for the use and benefit of MOSHER STEEL COMPANY and MOSHER STEEL COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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---

The Fluor Corporation, Ltd., Federal Insurance Company, Vigilant Insurant Company, Insurance Company of North America, General Insurance Company of America, Seaboard Surety Company, American Re-

Insurance Company, Employers Reinsurance Corporation and General Reinsurance Corporation, petitioners herein, respectfully pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Ninth Circuit rendered January 6, 1969 in this cause.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, to which this petition is directed, was issued January 6, 1969. It is not yet reported, and is appended as Appendix A. No opinion was rendered by the United States District Court for the District of Arizona.

JURISDICTION

No judgment has been entered by the Court of Appeals. On February 19, 1969 it entered its order staying issuance of judgment pursuant to Rule 41(b) Federal Rules of Appellate Procedure. Jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. §1254(1). Separate motions for rehearing by all parties were denied February 11, 1969.

QUESTIONS PRESENTED FOR REVIEW

1. Is a prime contractor liable under the Miller Act to a materialman of a second-tier subcontractor because the first-tier subcontractor guaranteed payment to the materialman; or, in other words, is a mere promise of payment, by a subcontractor to a person not otherwise entitled to recover under the Act, a "direct contractual relationship with a subcontractor" within the meaning of 40 U.S.C. §270(b)?

2. May a Court of Appeals award prejudgment interest on a claim the amount of which was not capable of being ascertained by computation

at the time of institution of suit, reversing a judgment of the trial court denying prejudgment interest based on a finding that the claim was unliquidated, there being no statutory authority or evidence to support the ruling of the appellate court?

3. Is it denial of due process for an appellate court to treat, as wholly disposing of the issue of prejudgment interest, a trial stipulation as to the value of stock received by the plaintiff as a credit on its claim?

4. Does the decision in question conflict with *Millers' National Ins. Co. v. Wichita Flour M. Co.*, 257 F.2d 93 (C.A. 10, 1958)?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved are printed as Appendix B hereto.

STATEMENT OF THE CASE

This action was filed by the use plaintiff, Mosher Steel Company, on January 23, 1963 to recover the sum of $321,053.54 (R. 1680). Of this amount $298,336.58 was sought from defendants Ward Industries Corporation, Union Tank Car Company, and Fluor Corporation, Ltd. and its sureties, for furnishing, fabricating and delivering steel used in the Titan II, Phase II, Missile site work at Davis-Monthan Air Force Base, Tucson, Arizona, and $22,716.96 was sought from defendants Union and Ward for furnishing, fabricating and delivering steel used in the similar work at Vandenberg Air Force Base, Lompoc, California. Judgment was ultimately entered on May 24, 1966 against defendants Ward and Union in the amount of $268,882.92 and against defendant Fluor and its sureties in the amount of $246,165.96 (R. 1240).

The Court found that the Mosher claim was unliquidated and denied prejudgment interest.

All defendants appealed and Mosher filed a cross appeal on the interest question. On appeal, the Court of Appeals sustained the judgment against the defendants and reversed the judgment denying interest, directing that the case be remanded to the District Court for further consideration on the cross appeal.

The facts which gave rise to the litigation are as follows:

In 1962 The Fluor Corporation Ltd. entered into a prime contract with the United States Government to construct certain missile facilities at Davis-Monthan Air Force Base near Tucson, Arizona, and posted the usual Miller Act bond.

Fluor let a first-tier subcontract to Union Tank Car Company, and Union in turn let a second-tier subcontract to IMI-Ward, a joint venture consisting of Idaho Maryland Industries, a corporation, (IMI) and Ward Industries Corporation.

As work progressed it appeared that the fabrication facilities of IMI would be inadequate to maintain schedule and Union requested IMI to arrange for another company to perform part of the work. An IMI superintendent arranged with Mosher to fabricate a portion of the steel to be used in the contract and to supply certain material. He represented to Mosher that it would be contracting with Union, but no purchase order was ever issued by Union and Mosher accepted a purchase order for the work from IMI-Ward. Mosher claimed, and the trial court held, that Mosher had refused to proceed with the work without an assurance of payment from Union and that Union's controller had

promised Mosher's credit manager that Union would pay Mosher and deduct the payment from sums due under its subcontract with IMI-Ward. Union denied that the promise had been made and proved that it had not only made no deductions from IMI-Ward's contract, but had paid IMI-Ward in full. The trial judge found that the promise had been made and based recovery by the plaintiff against Union on the oral promise. The court further held that the promise was a "direct contractual relationship" between Mosher and Union and, therefore, under the Miller Act. Fluor and the sureties on its Miller Act bond were also liable.

During the course of construction IMI encountered financial difficulties and on February 2, 1963, filed a petition under Chapter XI of the Bankruptcy Act. Mosher continued to deliver under its IMI-Ward purchase orders and made its last delivery on or about February 28, 1963.

The bankruptcy was settled by the distribution of IMI's stock, prorata, to its creditors and on December 31, 1963 the bankruptcy court ordered 642,107 shares of IMI stock distributed to Mosher. IMI later reorganized under the name of Allied Equities, and the stock was issued on a reverse 20-to-1 split so what Mosher actually received was 32,105 shares of the stock of Allied Equity Corporation.

At the trial the defendants contended that, under the doctrine of judicial estoppel, Mosher, having successfully asserted a claim against IMI in the bankruptcy court, and having received benefits therefrom, was barred from seeking recovery on the same claim against Union, Ward or Fluor. This was asserted as an absolute defense to Mosher's claim. The defendants asserted alternatively that, in the event Mosher secured judg-

ment against them, they would be entitled to a credit for the stock Mosher had received.

During the trial on December 1, 1964 (Tr. 681) Mosher's counsel informed the court he had "been unable to find any probative evidence" as to the value of the stock received by Mosher and offered to stipulate that it had a value of "one dollar and five-eights per share. This offer was accepted by the defendants.

In a judgment rendered May 24, 1966 the trial court held that the value of the stock received by Mosher was $52,170.62 and credited that amount to all defendants.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with decisions of this court in that it holds that a materialman to a second-tier subcontractor on a government contract is entitled to recover under the Miller Act against a prime contractor.

The decision below is in direct conflict with the decisions of this Court on the Miller Act, notably *Clifford F. MacEvoy v. U.S.*, (1944), 322 U.S. 102, 64 S. Ct. 890, 88 L.Ed. 1163, which is the leading case on the right of parties in the remoter relationships to recover under the Miller Act.

The fact that Mosher convinced the trial court that it had elicited an oral promise of payment from Union's controller does not alter the situation.

The Miller Act provides in part (40 U.S.C. 270b):

> ". . . any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days . . ."

Union was the subcontractor for the prime contractor, Fluor, and IMI-Ward was a sub-subcontractor or second-tier sub-contractor. Mosher was a materialman to IMI-Ward. Whether Mosher was a materialman or a *sub*-sub-subcontractor is immaterial, *Elmer v. U.S.F. & G. Co.* (C.A.5, 1960) 275 F.2d 89. In either event, it is not entitled to recover under the Miller Act under the *MacEvoy* decision.

Nevertheless, the Court found against Fluor and the Sureties and rendered judgment against them in the sum of $246,165.96. It also found against Ward as a member of IMI-Ward, to which the materials were delivered (Conclusion of Law 4, R.1238) and against Union (Conclusion of Law 6) on the basis of the telephone promise by Union's controller. The facts found by the Court as to this promise are embodied in Findings 35 and 38 (R. 1231, 1232) and are the foundation for the Court's Conclusion of Law No. 3:

> "3. Mosher had a direct contractual relationship with Union, and Mosher gave Fluor the written notice required by 40 U.S.C. Section 270b."

This Conclusion is the sole basis for the judgment against petitioners.

It is the position of petitioners that, even assuming that the findings and conclusions have support in the record and the law, the relationship found to exist between Mosher and Union is not the "direct contractual relationship" contemplated by the Miller Act. In considering this question, it is necessary to ascertain and give effect to the intention and purpose of the legislature in the adoption of this statute. This is the fundamental rule of statutory construction. 82 C.J.S. Statutes § 321.

"Direct contractual relationship" is not defined in the statute, but it is clear that the act, which is for the

protection of materialmen, laborers and subcontractors, was intended to protect persons having contractual relationship with a subcontractor *as a materialman, laborer or sub-subcontractor*. As stated in *MacEvoy*:

> "The proviso of Section 2(a) which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who gives the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and the expressed will of the framers of the Act" (88 L.Ed. 1168).

In support of this statement the Court appends the following footnote:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond. H.Rep.No. 1263 (74th Cong. 1st Sess.), p. 3."

In essence, the judgment held that Union had promised Mosher that it would pay IMI-Ward's debt if that joint venture failed to pay.

Whether the resulting legal relationship is suretyship or guaranty, or a contract for the benefit of a third party, or some other type of secondary liability, there is no language in the Miller Act which suggests, implies or infers that the Congress intended that the protection of the Miller Act should extend to persons who claim

a right to payment *other than as a materialman, laborer, or subcontractor.*

The fact that Mosher is also a materialman is beside the point. The judgment it seeks to sustain is based, not on that fact, but on the fact that the Court found that Union had promised to pay IMI-Ward's debt to Mosher.

That judgment cannot be sustained against these appellants unless Mosher brings itself within the statute.

As the Supreme Court said in *U.S. ex. rel. Sherman v. Carter*, (1951), 353 U.S. 210, 1 L.Ed.2d 776, 782:

> "The Miller Act represents a congressional effort to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the construction of non-federal buildings. The essence of its policy is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his supplies of labor and material. Thus the Act provides a broad but not unlimited protection."

Exhaustive research has failed to produce a single case in which a court has held that a claimant, too remote in the chain of subcontracts to come under the protection of the Miller Act, is entitled to recover against the prime contractor and its sureties because it had received a promise from the subcontractor that it would be paid.

Mosher did not have a direct contractual relationship with Union as a *laborer, materialman or subcontractor.* To hold that *any person* could recover on the Miller Act bond merely because of the existence of a direct contractual relationship with a subcontractor, would completely distort the intent and purpose of the Congress in adopting the Miller Act. As was said in MacEvoy:

> "Congress cannot be presumed, in the absence of express statutory language, to have intended to impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself."

There is no conceivable way in which Fluor could protect itself in the fact situation presented by this case.

The judgment against Fluor and the Sureties is erroneous and should be reviewed.

2. When the Appellate Court reversed the trial court's judgment denying prejudgment interest because plaintiff's claim was unliquidated, it did so without statutory authority or evidence to support its ruling.

Furthermore, the reversal denied petitioners and the other defendants due process because the Appellate Court treated, as disposing of the entire interest issue, a trial stipulation made by the parties as to the value of certain stock received by plaintiff as a credit against its claim.

The Miller Act makes no provision for interest, and Federal courts uniformly hold that state law is therefore applicable as to interest on Miller Act claims. The Arizona statute on interest appears in Appendix B. No Arizona law authorizes the imposition of prejudgment interest on unliquidated claims. The Court of Appeals erroneously stated that the parties were in disagreement as to whether California or Arizona law applied and cited (Footnote 13) a recent addition to a California statute permitting the discretionary allowance of prejudgment interest on unliquidated claims. The relevancy here is obscure, since the trial judge had held the claim to be unliquidated and had denied interest.

But the fundamental error is not a matter of state

law. Rather, the error lies in the court's misunderstanding of the situation at the trial and the effect of stipulation of the parties as to the value of the IMI stock received by Mosher. At the trial the defendants took the position that, under the doctrine of judicial estoppel, Mosher's claim in bankruptcy against IMI, and its acceptance of benefits from that claim barred it from asserting inconsistent claims against the defendants. Alternatively, the defendants asserted they would be entitled to a credit in the amount of the benefits received by Mosher.

Mosher did not concede any credit was due. Its pre-trial memorandum, (R.T.228), stated:

> "The Plaintiff's position is that the court should adjudicate which party in this action shall be given credit for the value of said stock, if and when said stock is received by Plaintiff."

During the trial Mosher was apparently unable to prove the value of the IMI stock and in this regard the Court advised plaintiff's counsel (R.T.449):

> "It appears in the record the plaintiff has received something on the transaction that gives rise to its claim and certainly there would be a credit on it. As to what the credit would be that is a matter of your proof. If counsel can stipulate on something, fine, but otherwise I think, you will have to show the proper credit."

Later in the trial the following transpired (R.T.681):

> "MR. PURNELL: One final thing, Your Honor, before plaintiff rests. The matter of the stock or value of the stock. Does the Court deem that that is a part of the plaintiff's case at this time or does the Court agree with the plaintiff's position in its pre-trial memorandum that the value should be determined at a later time?

THE COURT: I believe if you are to offer evidence as to the value, now is the time.

MR. PURNELL: Now is the time to do it. Your Honor, we have been unable to find any probative evidence on the subject. The defendants have offered to stipulate that the shares are worth one dollar and five-eights —

MR. LOTTERMAN: You say the defendants have offered to stipulate?

MR. PURNELL: I beg your pardon, Mr. Warnock.

MR. LOTTERMAN: This is the first I have heard of it.

MR. PURNELL: Mr. Warnock and Mr. McConnell. We don't think that the plaintiff could, actually ever could and certainly cannot now obtain that much money for it, but under the circumstances, the nature of the matter is such we feel that all of the doubt should be resolved in favor of the defendants on this score and we are prepared to stipulate that the shares were worth a dollar and five-eights at the time they were received."

There was no stipulation that defendants would receive a credit, or that the amount of the credit was liquidated, or when a credit would be effective or otherwise as to the dollar value of the credit, and Mosher did not pursue the point.

When the court rendered its decision on May 24, 1966, it found the stock to be worth $52,170.62. The Court held that ". . . Mosher's claims against all parties are unliquidated until judgment is entered." (R. 1240) and therefore denied prejudgment interest.

The general law, as well as that of Arizona and California, is that a plaintiff may recover prejudgment interest only if the amount of the recovery is, from the

institution of the action, "capable of ascertainment by mere computation." *U.S.F.&G. v. California-Arizona Const. Co.*, 21 Ariz. 172, 186 P. 502.

In this kind of case, interest is allowed as damages for the detention of money. 47 C.J.S. *Interest*, §3; *Arizona Eastern R. Co. v. Head*, 224 P. 1057 (Ariz.) Consequently, interest is not allowed if ". . . the person liable does not know the sum he owes and therefore can be in no default for not paying." *Arizona Eastern R. Co. v. Head*, supra. In other words, such a claim is unliquidated. That was the situation before the trial court.

IMI applied to the bankruptcy court for relief on February 2, 1962. Mosher's last invoice to IMI-Ward was dated February 28, 1962, and thereafter Mosher filed its claim against IMI in the bankruptcy court. As a creditor of IMI, at all times after February 2, 1962, Mosher was entitled to receive at least a pro rata payment from the bankruptcy, and any party electing to pay Mosher's claim on behalf of IMI would be required to take such prospective payment into consideration.

These petitioners had no contractual relation with Mosher and IMI-Ward or knowledge of their dealings. but suppose that Fluor, by some sort of prescience, had become aware of the trouble that was brewing and determined to pay off Mosher on February 28, 1962, to avoid the accumulation of interest or the interruption of the project?

What amount would have been due Mosher?

Would it be reasonable to hold that Fluor had a duty to pay the entire amount of Mosher's invoices, hoping for a refund from Mosher when it received payment out of the bankruptcy?

The answer obviously is "No." There was no possible way in which Fluor, or for that matter, any of the defendants, could have ascertained by computation the amount due Mosher.

Fluor had no relationship with Mosher and the claim against us is not for materials furnished, but for the balance owing Mosher from IMI *after* crediting dividends out of the bankruptcy.

The opinion says Mosher should not be denied prejudgment interest because of "seeking and obtaining partial payment from a joint obligor." This comment cannot apply to Fluor and the sureties, which were not joint obligors, and while it may be applicable to Union and Ward, cannot justify an award of prejudgment interest, especially against Fluor.

The Court of Appeals has held to be liquidated a claim, the amount of which was not settled until nearly two years after commencement of the litigation and nearly three years after the delivery of the material. While these facts alone indicate why the defendants are entitled to contend in good faith that the amount of the claim could not be ascertained by computation, the vice of the court's decision is the effect which it gave to the stipulation of the parties. That stipulation, it is clear from the above quoted portions of the record, was made solely for the purpose for expediting the trial. It amounted to an agreement that, as Mosher represented, the market value of IMI stock when received by Mosher was one and five-eighths. It left open the question of whether any credit was to be allowed and whether such credit if it was to be allowed, was to be given as of the date the issuance of stock was ordered, the date of receipt, or the date of judgment, or some other date.

Neither Mosher nor the defendants were ever in a position, until judgment was rendered, to be able to ascertain by "probative evidence" (R.T.681) the net amount of Mosher's claim. This was obvious to the trial court, which was clearly right on this issue.

The decision to grant prejudgment interest, made at the appellate level and based on the appellate court's erroneous construction of the stipulation, deprived these petitioners of their day in court on the interest issue, and denied them due process of law.

3. The Court of Appeals decision, treating the stipulation as justifying the imposition of prejudgment interest from the date plaintiff's claim became due, conflicts with the decision of another Court of Appeals.

The Court of Appeals for the Ninth Circuit held that plaintiff was entitled to prejudgment interest on the whole amount of its invoices from March 30, 1962 to the date Mosher received the stock in partial payment, and thereafter on the difference. The Court conceded that it had found no decisions directly on point.

The decision is in direct conflict with *Millers' National Ins. Co. v. Wichita Flour M. Co.*, 257 F.2d 93 (C.A. 10, 1958) which involved a question as to insurance coverage. During the trial the parties ". . . stipulated that the 'maximum insurance' applicable to the damaged unit was $77,447.45 . . . The court was authorized to enter judgment on the respective policies in the sums stated . . .if it was determined that the loss was covered by the policies." (257 F.2d 103)

Under this fact situation the Tenth Circuit held that the plaintiff was entitled to recover interest ". . . only from respective dates of the stipulations . . . ."

The conflict between circuits is emphasized by the language of the Ninth Circuit:

> "But uncertainty about the precise value of the partial payment should not bar Mosher from compensation for the continued loss of the use of the much larger balance remaining unpaid."

The Tenth Circuit is clearly right under the fact situation with which it dealt, *because the parties authorized the court to enter judgment for the stipulated amount if liability was proved.*

In the case at bar the claim *was never capable of* computation and became fixed only when judgment was rendered. The parties in this case did not stipulate that a judgment could be rendered for certain amount. The effect of the decision is to penalize the defendants for over $100,000.00 of prejudgment interest, for having made a simple stipulation as to a fact, in order to expedite the trial. If it is argued that the stipulation was ambigouous the language in *Henry Hanger & Display Fixture Corp. v. Sel-O-Rak Corp.*, 270 F.2d 635 (C.A. 5, 1959) is applicable:

> ". . . The courts cannot, under the guise of construction, insert into an agreement an essential element such as the subject matter to which the agreement 'shall apply'."

In this case interest should be allowed only from the date of judgment.

CONCLUSION

For the reasons stated, petitioners pray that a writ of certiorari issue to review the judgment of the court below.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., et al.,
UNION TANK CAR COMPANY,
WARD INDUSTRIES CORPORATION,
Appellants and Cross-Appelles,

vs.

UNITED STATES OF AMERICA, ex rel.
MOSHER STEEL COMPANY,
Appellees and Cross-Appellants.

No. 21,307
No. 21,307 A
No. 21,307 B
No. 21,307 C

[January 6, 1969]

Appeal from the United States District Court for the District of Arizona

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Before: HAMLIN, BROWNING, and ELY, Circuit Judges

BROWNING, Circuit Judge:

The district court rendered judgment in favor of Mosher Steel Company and against the various appellants for prices agreed to be paid for materials furnished and services rendered by Mosher in the fabrication of steel used in the construction of missile launch facilities in Arizona and California.[1] We affirm the trial court's

[1] Prior litigation in this court arising out of these projects is reported in Dragor Shipping Corp. v. Union Tank Car Co., 361 F.2d 43 (1966); 371 F.2d 722 (1967); 378 F.2d 241 (1967).

judgment except as it denied prejudgment interest. As to this, we reverse and remand for further proceedings.

Appellants strongly attack many of the trial court's findings. We have, therefore, examined the record with care. We find substantial conflicts in the testimony and the documentary evidence, and even stronger differences in the construction that the parties urge should be placed on events leading to the litigation and the inferences that should be drawn from them.[2] We have not asked ourselves whether we would have resolved the conflicts and ambiguities as the trial judge did, or whether we would have drawn the same inferences. *United States v. Real Estate Boards*, 339 U.S. 485, 495-96 (1950). We have, however, satisfied ourselves that upon an examination of the entire evidence we are not "left with the definite and firm conviction that a mistake has been committed" in any of the trial court's findings. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Commissioner v. Duberstein*, 363 U.S. 278, 291 (1960). We therefore accept the trial court's findings, and base the statements of fact in this opinion upon them.

Fluor Corporation, Ltd., was the prime contractor for the construction of the Arizona launch facilities, and the insurance company appellees were sureties on Fluor's performance bond. Matich Bros. and M. M. Sundt Corp., who are not parties to this litigation, were the prime contractors for the California launch facilities.

Fluor and Matich & Sundt entered into separate first tier subcontracts with Union Tank & Mfg. Co.[3]

[2] The parties are well aware of these conflicts and differences; they have explored them in great detail in their briefs. No useful purpose would be served by publishing them here.

[3] Union acted principally through a division known as Graver Tank & Mfg. Co., and the trial court's findings refer to "Union" and "Graver" interchangeably.

Union, in turn, entered into second tier subcontracts for steel fabrication work with IMI-Ward, a joint venture created by Idaho-Maryland Industries Inc. and Ward Industries Corporation.

When IMI-Ward fell behind schedule in the performance of its subcontract, Union, on October 10 or 11, 1961, instructed an IMI-Ward official to "farm out" the steel fabricating work, and approved the selection of Mosher to perform it. Because the IMI-Ward official did not think Mosher would accept an IMI-Ward purchase order, Union agreed that if a satisfactory contract could be worked out with Mosher, Union would give Mosher a Union purchase order.

On October 13, the IMI-Ward official negotiated a detailed contract with Mosher for the required work. As anticipated, Mosher would not accept IMI-Ward's credit. The IMI-Ward official then advised Mosher that Union purchase order would be issued. On October 16, Mosher set out the agreed-upon terms in a letter addressed to the IMI-Ward official. That official signed the letter on behalf of Union and sent copies of the executed writing to Union. Mosher then began performance of the work.

Union told Mosher on October 23 that Union's purchase order would be issued within two or three weeks, and that the October 16 letter would serve as an interim purchase order until the formal purchase order could be mailed. Thereafter, on October 31, IMI-Ward asked Mosher, as a matter of accounting convenience for IMI-Ward, to change the designated customer on the job from Union to IMI-Ward, and to accept IMI-Ward purchase orders in place of those of Union. Mosher agreed, provided Union would be responsible for payment.

IMI-Ward sent Mosher two purchase orders on November 3 covering the work to be done. Mosher informed Union that completed material would not be shipped until Mosher received confirmation that Union would be responsible for payment.

On November 15, after securing IMI-Ward's approval, Union advised Mosher that Union would pay Mosher directly and deduct the payments from the amounts Union was to pay IMI-Ward under the latter's subcontract.[4] Mosher understood, and Union intended Mosher to understand, that its commitment extended to all the work covered by IMI-Ward's purchase orders of November 3. Upon receiving Union's commitment, Mosher changed the customer's name from Union to IMI-Ward, completed the work, and delivered the fabricated steel to the job sites.

On February 2, 1962, IMI filed a voluntary petition under Chapter 11 of the Bankruptcy Act. Mosher submitted a proof of claim in these proceedings, and it was issued IMI stock under a plan of reorganization. Except for this stock, Mosher was not paid for its work.

The district court gave judgment against Union, finding that the commitment Union gave Mosher on November 15 and Mosher's completion and delivery of the work thereafter created a contract between Union

[4] The commitment was given orally. Union told Mosher that it would be confirmed by a subsequent letter. Although the letter was prepared by Union, it was not sent because Mosher continued to make shipments without it. Union argues that the sending of this letter was intended to be condition precedent to the formation of a contract, and that the trial court's finding to the contrary is clearly erroneous. We think the finding is supported by evidence from which the trial court could conclude that the promised letter was intended to be a written confirmation of an agreement already reached. Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng'r Corp., 305 F.2d 659, 664-65 (9th Cir. 1962), upon which Union relies, is inapplicable for this reason.

and Mosher obligating Union to pay Mosher directly. Judgment was rendered against Fluor and its sureties under the Miller Act, 40 U.S.C. § 270.[5] The district court entered judgment against Ward on the ground that IMI-Ward's November 3 work orders and Mosher's fabrication and delivery of material pursuant to such orders created a contract between Mosher and IMI-Ward obligating Ward to pay Mosher in accordance with the terms and conditions of those orders.

Union contends that Mosher performed the work for IMI-Ward; that Union's agreement, if any, was only a guarantee to pay Mosher if IMI-Ward did not; and, being oral, this agreement to answer for the debt of another was unenforceable under the Statue of frauds.

Ward, on the other hand, contends that the only viable contract was an oral agreement between Mosher and Union arising on October 13, binding Mosher to perform the work and Union to pay for it. If there was a November agreement between Mosher and IMI-Ward, Ward argues, it required nothing of Mosher which Mosher was not already obligated to do under its October agreement with Union, and, therefor, any promise by IMI-Ward was not supported by consideration. Furthermore, the only consideration for which Mosher bargained was Union's unconditional promise to pay Mosher directly. Consequently, any promise by IMI-Ward was not bargained for and hence was unenforceable under our decision in *Colorado Nat'l Bank of Denver v. Boehm,* 286 F.2d 494 (1961).

As we read the district court's findings, the court determined that *both* Union and IMI-Ward assumed

[5] Since Fluor as not involved in the California project, the judgment against Fluor and its sureties was limited to the amount due for materials used in the construction of the Arizona facilities.

direct obligations to pay Mosher for the work. IMI-Ward contracted directly with Mosher to have Mosher perform the work described in the November 3 work orders in return for payment by IMI-Ward of the prices fixed in those orders. This agreement was subject, however, to the condition precedent that Union also agree to be directly liable for payment. When Union agreed to pay Mosher, it became directly bound to Mosher. Union's promise also satisfied the condition precedent to the direct contractual obligations between IMI-Ward and Mosher.[6]

In view of Union's obligations under its subcontract with Fluor and Matich & Sundt, Union had a substantial interest in assuring performance of the work by Mosher. As the direct court found, "in agreeing to pay Mosher directly, [Union] . . . acted primarily to protect and advance its own interests under its subcontracts . . ." Since Union's promise to pay was a direct and original undertaking rather than a collateral promise to pay IMI-Ward's debt, it was not within the Statute of Frauds, even though IMI-Ward was also obligated to pay for the work. *Holmes v. Suffrin*, 198 Ill. App. 45 (1916); *Peters v. Raven*, 159 Ill. App. 122 (1910); *Leisman & Co. v. Otto*, 64 Ky. (1 Bush) 225 (1866); *cf. Granite City Lime & Cement Co. v. Board of Educ. of School Dist. 126*, 203 Ill. App. 134 (1916). See 4 Corbin on Contracts § 926, p. 705.[7]

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[6] Ward argues that no agreement arose because Mosher rejected an element of IMI-Ward's initial offer, namely, that IMI-Ward's credit be substituted for that of Union. There was substantial evidence supporting the trial court's findings that IMI-Ward agreed to Mosher's counter-offer to accept IMI-Ward work orders and to substitute IMI-Ward for Union as the account customer if Union would agree to pay for the work.

[7] Union also contends that its committement was limited to materials produced for use in constructing the Arizona launch facilities. Although the testimony of one witness might be read as supporting the limitation for

As to Ward's argument that any promise made by Ward to Mosher in November was without consideration because of Mosher's pre-existing contractual obligation to perform the same work for Union, it should be noted that the district court did not conclude that a Union-Mosher contract arose in October. Even if such a prior Union-Mosher contract existed, IMI-Ward's subsequent promise would still have consideration. Under the arrangement finally agreed to, Mosher, at IMI-Ward's solicitation, undertook the additional obligation to designate IMI-Ward, rather than Union, as the customer, and to accept the IMI-Ward purchase orders. These new undertakings were sufficient to support IMI-Ward's promise to pay.[8]

Ward's reliance upon *Colorado Nat'l Bank of Denver v. Boehm, supra,* 286 F.2d 494, is also misplaced. Mosher's insistence upon a direct commitment from Union does not mean that this was the only consideration for which Mosher bargained. Mosher also sought and obtained a promise of payment from IMI-Ward. The fact that IMI-Ward's promise alone was not enough to satisfy Mosher, or that Union's promise alone might have been sufficient, is irrelevant. *See Granite City Lime & Cement Co. v. Board of Educ. of School Dist. 126, supra,* 203 Ill. App. 134; *Peters v. Raven, supra,* 159 Ill. App. 122; Restatement of Contracts §§ 111, 113.

Ward contends that Ward is not liable even if IMI is, because the extension of credit or the delivery of

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which Union argues, as Mosher points out, there was other evidence supporting the trial court's finding that Union's commitment covered payment for all of the work Mosher was to do — whether used in construction of the Arizona facilities or those in California.

[8] The basis for IMI-Ward's interest in these arrangements is suggested by the district court's finding that the prices which IMI-Ward had agreed to pay Mosher for the work were lower than those which IMI-Ward would collect from Union for the work.

goods to one member of a joint venture does not obligate the joint venture. The cases upon which Ward relies involve the assumption of liability by a joint venturer beyond the scope of his authority to act for the joint venture.[9] Here, however, the district court concluded on the basis of findings supported by substantial evidence that IMI's acts were authorized by and performed on behalf of the IMI-Ward joint venture.

Both Union and Ward argue that because Mosher filed a claim in the IMI bankruptcy proceedings representing that the amount due Mosher was an unsecured independent obligation of IMI, and because Mosher accepted a distribution of the stock of the reorganized debtor on the basis of this claim, it is estopped from asserting that Union and Ward are liable. The result urged by Union and Ward can obtain only if it is required by some legal fiction for Mosher in its proof of claim against IMI explicitly reserved its rights against Ward, Union, Fluor, and the sureties.[10]

Thus, unlike the claimant in *Eads Hide & Wool Co. v. Merrill*, 252 F.2d 80 (10th Cir. 1958), which is relied on by Ward and Union, Mosher did not in the bankruptcy proceedings elect the remedy of recovery against only one of the allegedly liable parties. Moreover,

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[9] *See*, for example, Wreen v. Moskin, 226 App. Div. 563, 235 N.Y.S. 405 (1929); American Mut. Life Ins. Co. v. Hanna, Zabriskie & Daron, 297 Mich. 599, 298 N.W. 296, 299 (1941); and Matanuska Valley Bank v. Arnold, 223 F.2d 778 (9th Cir. 1955).

[10] Mosher's claim in the bankruptcy proceeding stated: "Claimant corporation claims that Ward Industries Corporation, as joint venturer with the Debtor, and Union Tank Car Company through its division, Graver Tank & Mfg. Co., are also liable to claimant corporation for the entire said debt, ... Claimant corporation's filing of the claim in this proceeding is made without prejudice to its rights against the said Ward Industries Corporation, and the said Union Tank Car Company . . . . In addition . . . claimant corporation has claimed that Fluor Corporation Ltd. and its sureties are liable . . . ."

Mosher did not assume different positions as to the facts in that proceeding and in this. It is not for us to say whether the decision allowing Mosher's claim in the bankruptcy proceeding was correct. We do hold that Mosher's full disclosure and express retention of rights in that proceeding precluded an estoppel against Mosher in this litigation.[11]

In addition to defending against Mosher's claim, Union filed a counterclaim alleging that if it were liable at all it would be as a surety only, and praying that Mosher be required to seek satisfaction first from Ward. In its findings and conclusions the trial court did not refer expressly to Union's counterclaim. When the omission was called to the court's attention, the court entered a judgment that Union "take nothing by its counterclaim." Union contends that the existence of a principal-surety relationship not only was admitted in Mosher's answer to Union's counterclaim but was established by the evidence, and that, in any event, the district court erred in disposing of the counterclaim without entering findings of fact and conclusion of law as required by Fed. R. Civ. Proc. 52(a).

The purpose of Rule 52(a) is satisfied if the trial court's findings are sufficient to afford a clear understanding of the ground upon which the court based its judgment. *Seligson v. Roth*, __ F.2d __ (9th Cir. 1968). It is apparent to us that the trial court rejected Union's counterclaim because it found Union's relationship to the debt to be that of a direct obligor, not a surety. Contrary to Union's contention, Mosher did not admit in its

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[11] Mosher will not obtain double recovery. In computing the amount of the judgment, the trial court deducted the stipulated value of the stock received by Mosher in the bankruptcy proceeding.

pleadings that Union was merely a guarantor;[12] and, as we have said, the trial court's findings that Union agreed to a direct and primary obligation is not clearly erroneous.

On the basis of this finding we also reject the contention advanced by Fluor and its sureties that Mosher was not a "person having a direct contractual relationship with a subcontractor" of Fluor within the meaning of 40 U.S.C. § 270(b). We are not convinced that recognition of Mosher's claim will extend the coverage of the Miller Act beyond that intended by Congress, nor that the result will be to "impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself." *MacEvoy v. United States*, 322 U.S. 102, 110 (1944). Fluor could easily have protected itself by requiring appropriate security from Union. *See Hill v. American Surety Co.*, 200 U.S. 197, 204-05 (1906); *Mankin v. Ludowici-Celandon Co.*, 215 U.S. 533, 540 (1910).

We turn to Mosher's cross-appeal from the portion of the judgment which denied prejudgment interest on the amount found to be due under the contracts.

There is some disagreement among the parties as to whether the governing law is that of the state of the forum (Arizona) or of the states in which the contracts were to be performed (Arizona and California). Since there is nothing to indicate that the relevant law of the two states differs, we have not concerned ourselves with

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[12] In its answer to Union's counterclaim, Mosher admitted that it had alleged in the complaint that Union was a surety, but Mosher also stated "the amended Complaint includes other counts and allegations as therein set forth." These "other counts and allegations" of Mosher's complaint asserted that Union was directly liable to Mosher for the debt. "A party may . . . state as many separate claims . . as he has regardless of consistency . . . ." Fed. R. Civ. Proc. 8(e)(2).

the problem. The California rule is stated in section 3287, California Civil Code, "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . ." Arizona follows the same general rule.[13]

Cross-appellees argue that Mosher's damages were not "certain or capable of being made certain by calculation" prior to judgment because of the disputed value of the IMI stock which Mosher received in partial payment of its claim in the IMI bankruptcy proceedings. The dispute over the stock's value was not resolved until the parties stipulated to its worth during the course of trial.[14]

Clearly, this circumstance did not render the

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[13] The California statute was enacted in 1872, and states the common-law rule. Restatement, Contracts § 337(a). Arizona has not codified the rule, but it is followed by the courts of that state. United States Fidelity & Guar. Co. v. California-Arizona Constr. Co., 21 Ariz. 172, 186 Pac. 502, 509 (1920); Palmcraft Dev. Co. v. Phoenix, 46 Ariz. 400, 51 P.2d 921 (1935); Schartz v. Schwerin, 85 Ariz. 242, 250, 336 P.2d 144, 149 (1959); Feighner v. Clarke, 2 Ariz. App. 286, 408 P.2d 219, 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P.2d 513 (1966) (in banc); Betz v. Goff, 5 Ariz. App. 404, 406, 427 P.2d 538, 540 (1967).

A recent addition to the California statute provides that where an unliquidated contract claim is involved interest may be awarded, in the courts' discretion, for some or all of the period between the filing of suit and entry of judgment. Calif. Stats. 1967, ch. 1230, § 1.

[14] Cross-appellees also intimate that Mosher should be denied prejudgment interest because the issue of liability was disputed. The generally accepted rule is that uncertainty as to liability, as distinguished from uncertainty as to the amount of the damages, does not bar recovery of prejudgment interest. Restatement, Contracts § 337(a), comment d. Despite disputed liability, prejudgment interest was awarded in both Feighner v. Clarke, 2 Ariz. App. 286, 408 P.2d 219, 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P.2d 513 (1966) (in banc); and Betz v. Goff, 5 Ariz App. 404, 406, 427 P.2d 538, 540 (1967). California cases to the same effect are collected in 5 U.C.L.A. L. Rev. 262, 266 n. 28 (1958).

amount of Mosher's claim uncertain until it arose. At a minimum, therefore, Mosher was entitled to prejudgment interest on the whole amount owing under the contracts from the date it became due (thirty days after February 28, 1962) to the date Mosher received the stock in partial payment.

It is equally apparent that Mosher was not entitled to interest after the latter date upon the portion of his claim which had been paid. But uncertainty about the precise value of the partial payment should not bar Mosher from compensation for the continued loss of the use of the much larger balance remaining unpaid. Interest on the difference between the amount due Mosher under the contracts and the value of the stock as determined at trial should be allowed from the date the stock was received to the date of judgment. Although we have found no decisions directly on point, this result is supported by analogous authorities.

Thus, even though the existence of an unliquidated counterclaim or set-off necessarily puts the amount payable in doubt, it is well settled that it does not render the claim itself uncertain or deprive the claimant of the right to prejudgment interest.[15] If the unliquidated set-off or counterclaim is based upon a breach unrelated to the sum due under the primary claim, interest is al-

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[15] Hansen v. Covell, 218 Cal. 622, 631-32, 24 P.2d 772, 775, 89 A.L.R. 670 (1933) (in banc); McCowen v. Pew, 18 Cal. App. 482, 483 *et seq*, 123 Pac. 354, 355-56; Hunt Foods v. Phillips, 248 F.2d 23, 26-27 (9th Cir. 1957) (Calif.). Other California decisions are collected in 14 Cal. Jur. 2d 79, 705-06, and 5 U.C.L.A. L. Rev. 262, 268 n. 37 (1958). *See also* Mall Tool Co. v. Far West Equip. Co., 45 Wash. 158, 273 P.2d 652, 663 (9th Cir. 1963); American Sur. Co. v. United States, 368 F.2d 475, 479-80 (9th Cir. 1966); 5 Corbin, Contracts § 1051, pp. 305-06.

"In short," Professor McCormick states, "it is the character of the claim and not of the defense that is determinative of the question whether an amount of money sued for is a 'liquidated sum.'" McCormick on Damages, § 54 p. 216 (1935).

lowed on the entire claim. The amount of the counterclaim or set-off as determined at trial is then deducted from this total. If, as in the present case, the unliquidated set-off or counterclaim constitutes a partial payment of the primary claim, interest is allowable on the balance due after deducting the amount of the set-off or counterclaim as determined at trial.[16]

The result we reach is also supported by the principle recently applied in *Coleman Eng'r Co. v. North American Aviation*, 55 Cal. Rep. 1, 420 P.2d 713 (1967). There, defendant argued that prejudgment interest was barred because a lesser amount of damages was awarded than plaintiff had originally demanded. The reduced claim resulted from the plaintiff's successful efforts in obtaining settlements with third persons and in salvaging materials. The Supreme Court of California held that under these circumstances uncertainty as to the amount due did not bar an award of prejudgment interest. It stated, "we are satisfied that reductions in damages due to plaintiff's efforts to mitigate damages should not preclude an award of prejudgment interest. If the rule were otherwise, a plaintiff might be encouraged to forego opportunities to mitigate damages so as not to jeopardize his right to prejudgment interest." Similarly, Mosher's right to prejudgment interest should not be denied because Mosher in seeking and obtaining partial payment from a joint obligor reduced the amount of its claim against cross-appellees.

The judgments are affirmed on the appeals and reversed for further consideration on the cross-appeal.

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[16] Hansen v. Covell, 218 Cal. 622, 631-32, 24 P.2d 772, 775-76 (1933) (in banc); Hunt Foods v. Phillips, 248 F.2d 23, 26-27 (9th Cir. 1957) (Calif.); and cases collected at 14 Cal. Jur. 2d § 79, pp. 705-06.

APPENDIX B

ARIZONA REVISED STATUTES § 44-1201. Rate of interest for legal indebtedness; limitation on rate of interest which may be contracted; interest on judgments

A. Interest for any legal indebtedness shall be at the rate of six dollars upon one hundred dollars for a year, unless a different rate is contracted for in writing.

B. A rate of interest, not to exceed eight per cent per annum, if agreed to in writing, signed by the debtor, shall be paid. A judgment given on such agreement shall bear the rate of interest provided for in the agreement, and it shall be specified in the judgment.

FEDERAL RULES OF APPELLATE PROCEDURE, RULE 41 (b

(*b*) *Stay of Mandate Pending Application for Certiorari.* A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion, reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme ourt. Upon the filing of a copy of an order of the Supreme Court denying the peition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required a a condition to the grant or continuance of a stay of the mandate.

49 STAT. T 94, 40 U.S.C. § 270b. (a)

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to proescute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

62 STAT. 928, 28 U.S.C. § 1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1178

WARD INDUSTRIES CORPORATION,

Appellants and Cross-Appellees,

VS.

UNITED STATES OF AMERICA, *ex rel.*
MOSHER STEEL COMPANY,

Appellees and Cross-Appellants.

PETITION BY WARD INDUSTRIES CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Reasons for Granting the Writ—

1. The Final Judgment Against IMI Procured By Mosher In The IMI Bankruptcy Proceeding Was Based Upon Mosher's Claim That The Obligation For The Materials Fabricated And Delivered To The Tucson And Vandenberg Jobs Was An Individual Obligation Of IMI Created By The Independent Undertaking Of IMI. After Obtaining The Benefit Of That Final Judgment, Mosher Cannot, In Violation Of The Bankruptcy Act, 11 U.S.C. § 23 (g), Completely Reverse Its Position and Now Contend That The Obligation Upon Which It Collected In The Bankruptcy Court Was Not An Individual Obligation Of IMI But An Obligation Of The Joint Venture Of IMI-Ward 14

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2. The Statutory Scheme Of Distribution Embodied In The Bankruptcy Act, 11 U.S.C. § 23 (g), Cannot Be Circumvented And Annulled By The Device Of Including In The Proof Of Claim Filed By An Individual Creditor Upon The Individual Obligation Of An Individual Bankrupt The Statement That It Was Being Filed "without prejudice" To The Creditor's Right To Recover Against A Non-Bankrupt Partner Or Joint Venturer Upon The Ground That The Obligation Was In Fact A Partnership Or Joint Obligation 22

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IN THE

Supreme Court of the United States

October Term, 1968

No. .....

FLUOR CORPORATION, LTD., *et al.*, UNION TANK CAR COMPANY, WARD INDUSTRIES CORPORATION,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, *ex rel.* MOSHER STEEL COMPANY,

Appellees and Cross-Appellants.

PETITION BY WARD INDUSTRIES CORPORATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WARD INDUSTRIES CORPORATION ("Ward"), a Delaware corporation (R 1221), the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-captioned cause on the 6th day of January, 1969.

By its judgment, the Court of Appeals affirmed a judgment of the United States District Court for the District of Arizona, sitting at Tucson, Arizona, in favor of the plaintiff MOSHER STEEL COMPANY ("Mosher") and against the defendants, THE FLUOR CORPORATION LTD. ("Fluor") and the surety companies upon a Miller Act

bond, for the sum of $246,165.96 and against the UNION TANK CAR COMPANY ("Union") and Ward, the petitioner herein, for the sum of $268,882.92 (R 1241).

Opinions Below

The opinion of the Court of Appeals is not yet reported but is printed as Appendix A, infra, pp. 1a to 14a. The District Court made findings of fact and conclusions of law (R 1220-1240) but rendered no opinion.

Jurisdiction

On January 28, 1969, your petitioner filed a timely petition for a rehearing which was denied by the Court of Appeals on February 11, 1969. On February 19, 1969, the Court of Appeals entered an order staying the issuance of judgment pending the filing, consideration and disposition by this Court of a petition for a writ of certiorari to be made by Ward, providing such petition is filed in the office of the Clerk of this Court on or before March 19, 1969.

The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

Questions Presented for Review

(1) Under the Bankruptcy Act, 11 U.S.C. § 23 (g), may a creditor, in the individual bankruptcy of a member of a known partnership or joint venture, file a claim against the bankrupt upon an individual obligation of the bankrupt, procure a final judgment in the bankruptcy proceedings against the bankrupt individually, share equally in the individual assets of the bankrupt with all other

individual creditors of the bankrupt and, then, after receiving the full benefits provided by such judgment in the Bankruptcy Court, recover the remaining balance of the claim from the non-bankrupt partner or joint venturer upon the ground that the claim was not an individual obligation of the bankrupt but was in fact a partnership or joint venture obligation?

(2) Can the statutory scheme embodied for many years in the Bankruptcy Act, 11 U.S.C. § 23 (g), be circumvented and annulled by the simple expedient of adding to a proof of claim filed by an individual creditor upon the individual obligation of an individual bankrupt the statement that it was being filed "without prejudice" to the creditor's right to recover, subsequently, any remaining balance against the non-bankrupt partner or joint venturer upon the ground that the obligation was in fact a partnership or joint venture obligation?

Statutes Involved

The provisions of the Bankruptcy Act, 11 U.S.C. § 23 (g), are as follows:

> § 23, subd. (g) The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each general partner to the payment of his individual debts. Should any surplus remain of the property of any general partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be distributed among

the individual partners, general or limited, or added to the estates of the general partners, as the case may be, in the proportion of their respective interests in the partnership and in the order of distribution provided by the laws of the State applicable thereto.

Statement of the Case

The plaintiff, Mosher, is a steel fabrication firm located in Texas with its principal offices in Dallas and Houston. It brought this action in the United States District Court at Tucson, Arizona to recover the sum of $321,053.54 as the value of the services which it rendered and the materials which it furnished to Union under a written and oral contract with Union for Union's use in the erection of certain levels and structures at the missile launch facilities near the Davis-Monthan Air Base at Tucson, Arizona (the Tucson Project) and the Vandenberg Air Force Base at Vandenberg, California (the Vandenberg Project).

The prime contract for the Tucson Project was issued to Fluor by the United States Army Corps of Engineers Ballistic Missile Construction Office. Fluor, in turn, subcontracted a substantial portion of the work required by the prime contract to the Graver Mfg. Company ("Graver"), a division of Union.[1] Under its subcontract,

[1] The following terminology and abbreviations which were used in the Trial Court are employed in this petition: Union and Graver are used interchangeably as one and the same; Joint Venture refers to the joint venture consisting of Idaho-Maryland Industries, Inc. and the petitioner, Ward Industries Corporation, and is refered to as IMI-Ward; "R" refers to the Record on Appeal; "RT" refers to the reporter's transcript; "Jt." refers to joint exhibits stipulated by all of the parties; "Pl." refers to exhibits introduced in evidence by Mosher; and Ward and Union exhibits, respectively, are identified in each instance by the name of Ward and Union to the exhibits introduced by each.

Union was required to purchase, fabricate and erect the steel required for certain levels and structures upon the project (Jt. Exh. 2). Thereafter, Union subcontracted a portion of its subcontract work, including the steel fabrication, but not the steel erection, to a joint venture consisting of Idaho-Maryland Industries, Inc. ("IMI") and the petitioner, Ward (Jt. Exh. 8).

The Employment of Mosher by Union to Fabricate Union's Steel

Prior to October 13, 1961, the task of fabrication had been assigned by IMI to its Denver Steel and Iron Division (R 1225). Because of an accelerated delivery schedule, Union's officers became concerned, prior to October 13, 1961, that Denver's production facilities were not adequate to fabricate Union's raw steel and deliver the fabricated product to Union within the time required by the project's delivery schedule (RT 180, 183; 184-185). Denver's general manager was thereupon authorized to place the work elsewhere (RT 186; 232). With Union's approval, Mosher was approached as a possible fabricator (RT 232-234). Mosher was willing to perform the fabrication work but refused to accept the credit of IMI, Ward or the joint venture of IMI-Ward (RT 74-75; 247; 437-439). It would only perform the work upon the express promise of Union to pay therefor (RT 249; 433-434).

Upon Union's oral and written agreement with Mosher that it would issue to Mosher its own purchase order and become directly and primarily responsible for the payment to Mosher of the fabrication costs, Mosher proceeded on a crash basis to perform the work of fabrication (RT 250). The work was commenced by Mosher on October 17, 1961, Mosher entering the necessary shop orders

upon its records for the fabrication of Union's steel (RT 78-79).

Subsequently, according to Mosher, and on October 31, 1961, IMI's representatives requested Moore, Mosher's Treasurer, to release Union from its obligation to Mosher and substitute the purchase orders of IMI for the purchase orders of Union (RT 262-264). According to Mosher, the IMI representatives informed Moore that IMI's bookkeeping would be simplified and its processing of Mosher's invoices facilitated if IMI were substituted for Union as the customer upon Mosher's books. Moore adamantly refused to release Union. He testified that he did not have the slightest interest in IMI's bookkeeping or invoice processing and did not care what name appeared as the customer upon Mosher's books "as long as Graver would be responsible for payment of the material" (RT 340-342).

Moore was perturbed by the IMI representatives' unexpected attempt to substitute what was to him a bad and thoroughly unsatisfactory credit for the credit of Union. He realized that the request "would constitute a change in the agreement which it (Mosher) theretofore had with Graver" (R 1470). As a result, Moore demanded from Union an explicit reaffirmation of its liability to Mosher and informed Union that he would not release any of the materials then being fabricated until he received that reaffirmation. He placed a stop order upon the very first shipment which was at that time virtually ready for delivery (RT 342-344).

On November 10, 1961, Mosher received, completely unsolicited and unanticipated, two purchase order forms of IMI (RT 439-440; Jt. Exs. 9 and 10), both of which were dated November 3, 1961 and signed by Frank J. Wright, the buyer for IMI (RT 153). One pertained to the Tucson Project and the other to Vandenberg. Moore

instructed Mitchell of the Dallas office to keep them on his desk "with no action on them" (RT 169).

On November 13, three days later, Morton, IMI's President, telephoned Moore and asked him to accept the two IMI purchase orders in lieu of a purchase order from Union (RT 359). Moore refused. He told Morton that he would not release any of the shipments unless Union agreed to pay Mosher directly for Mosher's work (RT 360). He suggested that Morton "get in touch with Mr. Page (Union's Comptroller) and give his approval of having them (Union) pay for this work" (RT 359).

On November 15, Moore telephoned Page and asked Page if he had obtained Morton's approval "for them (Union) to pay us direct and deduct it from the contract" between the joint venture and Union (RT 362). Page told Moore (RT 362): "He said that he had talked to Mr. Morton and Mr. Morton had given him approval".

On November 16, 1961, the day after Moore's conversation with Page, and simultaneously with the receipt of a telegram from Page, Moore released the order for shipment (RT 365). On the same day, he instructed Mitchell of Mosher's Dallas office to enter a supplement, #2, "to change customer's name from Graver Tank & Manufacturing Co. to Idaho-Maryland Industries, Inc." (Jt. Ex. 13; RT 91-93; 169). The supplement also recorded the fact that "all shipments are to be made to Graver Tank and Manufacturing Co." at Tucson (Jt. Ex. 13). At the same time, Moore directed the entry of a Mosher shop order for the Vandenberg fabrication (Pltff. Ex. 22A; RT 101).

The following indisputable facts were incontrovertibly established by Mosher's records:

1. The name of the customer upon the plaintiff's shop orders was changed by Mosher itself from Graver to IMI (Jt. Ex. 13), and *not* from Graver to the joint venture;

2. The name of the customer upon the plaintiff's weekly production records (Pltff. Ex. 34) was changed by Mosher itself from Graver to IMI, and *not* from Graver to the joint venture;

3. Mosher's accounts receivable ledger for both the Tucson and Vandenberg jobs (Jt. Exs. 17 and 18) show, as Mosher's debtor, only "Idaho-Maryland Industries, Inc." and *not* the joint venture;

4. Every invoice issued by Mosher for the Tucson and Vandenberg jobs (Jt. Ex. 14) show that the materials were sold only to IMI and *not* the joint venture, with the additional typed inscription thereon: "Customer Graver Tank Manufacturing Co." under the printed heading "Shipped to and Destination"; and

5. On February 20, 1962, after IMI's bankruptcy, Moore, as Secretary-Treasurer of Mosher, wrote to Fluor, advising Fluor that it furnished "Idaho-Maryland Industries, Inc.", and *not* the joint venture, "approximately $296,000.00 of fabricated steel and for fabricating steel furnished by Graver Tank" (Jt. Ex. 81).

IMI's Bankruptcy

Prior to the completion of Mosher's work and on February 2, 1962, IMI *individually* filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of California, Central Division (R 674-675) seeking a rearrangement under Chapter XI of the Bankruptcy Act (R 1235).

On August 10, 1962, and before the within action was commenced, Mosher filed its proof of claim in the IMI bankruptcy proceedings (Union Ex. E; R 1236; 676-679). As appears therefrom, Mosher claimed that IMI, *individually,* was "justly and truly indebted to the plaintiff corporation for the sum of $321,053.54" (R 676), the exact amount for which the present action was brought against Ward and Union (R 268-280). Mosher annexed, as exhibits to its proof of claim, its invoices to IMI (R 677) and the two purchase orders from IMI of November 3, 1961 (R 672-673), alleging that they were "the purchase orders upon which the debt is founded . . ." (R 677).

Mosher filed its claim against IMI as an individual creditor of IMI upon an individual obligation of IMI. It also alleged in its proof of claim (R 678):

> "Claimant corporation claims that Ward Industries Corporation, as joint venturer with the Debtor, and Union Tank Car Company through its Division, Graver Tank & Mfg. Co., are also liable to claimant corporation for the entire said debt . . . Claimant corporation's filing of the within claim in this proceeding is made without prejudice to its rights against the said Ward Industries Corporation and the said Union Tank Car Company through its Division, Graver Tank & Mfg. Co., and claimant corporation retains and reiterates said claim against said companies."

On December 31, 1963, a final judgment was entered by the Bankruptcy Court allowing the plaintiff's claim against IMI in full for the sum of $321,053.54 (R 680-681). As appears from the face thereof, the judgment was entered after "hearing before the Court . . . and the issues having been duly tried and a decision having been duly

rendered" (R 680; Union Ex. D). IMI was ordered to issue to the plaintiff "642,107 shares of capital stock in the Debtor corporation to Mosher Steel Company pursuant to the Plan of Arrangement heretofore confirmed and, when so issued, any and all obligations of said Idaho-Maryland Industries Inc. to Mosher Steel Company, which obligations are set forth in Claim #832, are hereby declared to be *extinguished and satisfied in full*" (R 681; Union Ex. D).

Mosher stipulated in this case, and the District Court found, that the number of shares provided by the judgment of the Bankruptcy Court were duly issued by IMI and accepted by it; that subsequent to such issuance and acceptance, a reverse split was voted whereby Mosher received one share of stock of Allied Equities Corporation ("Allied"), the successor of IMI, for every 20 shares of IMI stock; that it became the owner and holder of the shares of stock so issued by Allied in exchange for the shares of stock of IMI; and that the value of those shares was the sum of $52,170.62 (R 1239).[2]

It is equally undisputed that no petition in bankruptcy has ever been filed by Ward or the joint venture. The bankruptcy of IMI was a bankruptcy of IMI alone. As appeared from the undisputed testimony of IMI officers, IMI was the owner of approximately seven divisions located in California, Colorado and Arizona (R 665). Approximately 50% of the production of those divisions was totally unconnected with IMI's joint venture enterprises at Tucson and Vandenberg, being individual contracts in which IMI was individually engaged (R 665). In connection with such individual work, IMI incurred substan-

[2] The aforesaid sum of $52,170.62 was deducted from the amount sued for in this action by Mosner (R 1239).

tial individual obligations and realized substantial individual accounts receivable. Both the accounts receivable, as well as the accounts payable, were due and owing from and to IMI individually, and were in no way connected with or related to the joint venture (R 665).

Ward's Motions for Summary Judgment and Dismissal

On November 2, 1964, Ward moved for a summary judgment in this case upon the ground that the final judgment in favor of Mosher rendered by the Bankruptcy Court in the individual bankruptcy of IMI, and the recovery provided therein for Mosher, which Mosher thereafter received in full, was final, binding and conclusive in the present suit and forever barred and judicially estopped Mosher from maintaining the within action against Ward for the identical claim allowed by the Bankruptcy Court (R 650-694).

By its motion, Ward called the attention of the Court to the statutory scheme embodied for decades in the Bankruptcy Act, 11 U.S.C. § 23 (g), as interpreted by this Court and various Courts of Appeals, and more particularly the Court of Appeals for the Tenth Circuit in *Eads Hide & Wool Co.* v. *Merrill,* 252 F. 2d 80 (1958), which held that a claimant who has declared himself to be an individual creditor of a bankrupt partner, and accepted its pro rata share of the individual assets of the bankrupt with other individual creditors, cannot thereafter claim that the obligation was, in fact, a partnership or joint venture obligation for which it was subsequently entitled to sue the non-bankrupt partner or joint venturer.

The District Court denied the motion. Upon the conclusion of the trial herein, Ward again moved for a dis-

missal of Mosher's case against it and the motion was again denied.

The Decision of the Court of Appeals Herein

Upon its appeal to the Court of Appeals herein, Ward again urged that the recovery granted to Mosher against Ward by the Arizona District Court was in conflict with the provisions of the Bankruptcy Act, 11 U.S.C. § 23 (g), as well as the decisions of this Court and the several Courts of Appeals, particularly the Tenth Circuit in the *Eads* case, *supra*. In overruling Ward's position, the Court of Appeals declared (Opinion, Appendix A, pp. 8a-9a):

> "Both Union and Ward argue that because Mosher filed a claim in the IMI bankruptcy proceedings representing that the amount due Mosher was an unsecured independent obligation of IMI, and because Mosher accepted a distribution of the stock of the reorganized debtor on the basis of this claim, it is estopped from asserting that Union and Ward are liable. The result urged by Union and Ward can obtain only if it is required by some legal fiction for Mosher in its proof of claim against IMI explicitly reserved its rights against Ward, Union, Fluor, and the sureties.
>
> Thus, unlike the claimant in *Eads Hide & Wool Co.* v. *Merrill*, 252 F. 2d 70 (10th Cir. 1958), which is relied on by Ward and Union, Mosher did not in the bankruptcy proceedings elect the remedy of recovery against only one of the allegedly liable parties. Moreover, Mosher did not assume different positions as to the facts in that proceeding and in this. It is not for us to say whether the decision allowing Mosher's claim in the bankruptcy proceeding was correct. We do hold that Mosher's full disclosure and express re-

tention of rights in this proceeding precluded an estoppel against Mosher in this litigation."

Under the foregoing ruling of the Court of Appeals, the statutory scheme contained in the Bankruptcy Act, 11 U.S.C. § 23 (g) can be circumvented and annulled by the simple expedient of including in a proof of claim filed by an individual creditor upon an individual obligation of an individual bankrupt, the statement that it was being filed "without prejudice"; thereby enabling the creditor to recover, subsequently, the remaining balance against the non-bankrupt partner or joint venturer upon the ground that the obligation was not an individual obligation but was in fact a partnership or joint venture obligation.

It is respectfully submitted by the petitioner that the decision of the Court of Appeals is in direct conflict with the explicit phraseology of the Bankruptcy Act, the prior decisions of this Court and the determinations of various Courts of Appeals, including the decision of the Tenth Circuit in *Eads Hide & Wool Co.* v. *Merrill, supra.* The petitioner respectfully prays that a writ of certiorari issue for the purpose of reviewing the decision of the Court of Appeals herein in order to determine whether the Bankruptcy Act, 11 U.S.C. § 23 (g) and the Congressional scheme of distribution provided therein may be so easily vitiated and annulled.

Reasons for Granting the Writ

1. The Final Judgment Against IMI Procured By Mosher In The IMI Bankruptcy Proceeding Was Based Upon Mosher's Claim That The Obligation For The Materials Fabricated And Delivered To The Tucson And Vandenberg Jobs Was An Individual Obligation Of IMI Created By The Independent Undertaking Of IMI. After Obtaining The Benefit Of That Final Judgment, Mosher Cannot, In Violation Of The Bankruptcy Act, 11 U.S.C. § 23 (g), Completely Reverse Its Position And Now Contend That The Obligation Upon Which It Collected In The Bankruptcy Court Was Not An Individual Obligation Of IMI But An Obligation Of The Joint Venture Of IMI-Ward.

On February 2, 1962, IMI individually filed a petition in bankruptcy. Upon the filing of that petition, Mosher was confronted with the necessity of choosing between two diametrically opposed alternatives. Were the materials which it fabricated and delivered to the Tucson and Vandenberg jobs fabricated and delivered under an individual and independent undertaking of IMI, thereby creating an individual liability, or was it a joint venture obligation upon which IMI and Ward as separate entities were only secondarily responsible as joint venturers as a consequence and incident of partnership law?

The resolution of these questions depended upon Mosher's treatment of the two purchase orders dated November 3, 1961 for the Tucson and Vandenberg jobs, issued to Mosher upon the purchase order forms of IMI. If those purchase orders constituted an individual obligation of IMI, then, under the Bankruptcy Act, 11 U.S.C. § 23 (g), Mosher was entitled to file its claim for the full

amount of $321,053.54 against IMI individually on an equal basis with all individual creditors of IMI, and share equally with all other creditors of IMI in the assets of IMI. If, on the other hand, these purchase orders, regardless of the manner in which they were signed and issued, created an obligation of the joint venture, then, under the provisions of 11 U.S.C. Section 23 (g), Mosher could only file a claim in the bankruptcy proceedings of IMI as a creditor of the joint venture. Such a claim would have been subordinated to the claims of the individual creditors of IMI and limited solely to any surplus available to joint venture creditors which might exist after the individual creditors of IMI had been satisfied in full.

On August 10, 1962, six months after the bankruptcy petition was filed, with a full and comprehensive knowledge of all the facts, i.e., the existence of the joint venture and IMI's participation therein as a joint venturer, Mosher made its election, an election which, under the Bankruptcy Act and decisional law, was final, binding and conclusive. As appears from its proof of claim (R 676-679), it elected to file a claim against IMI as an individual creditor of IMI, upon the ground that the purchase orders of November 3, 1961 created an individual and independent liability of IMI. It annexed, as an exhibit to its proof of claim, the two purchase orders of November 3, 1961, alleging that they were "the purchase orders upon which the debt is founded * * *." (Proof of claim, par. 7, R 677.)

On December 31, 1963, a final judgment was entered by the Bankruptcy Court, allowing Mosher's claim against IMI in the sum of $321,053.54 and providing for its extinguishment and satisfaction "in full" by IMI (R 680-681). The benefits provided by that judgment have been received by Mosher in full. That judgment constituted a complete and total bar to Mosher's attempted assertion of

the identical claim in this lawsuit against Ward based upon the completely contradictory theory that the two purchase orders of November 3, 1961 created not an individual and independent obligation of IMI, but a joint venture obligation for which Ward is liable as an incident of partnership law.

In *Eads Hide & Wool Company* v. *Merrill,* 252 F. 2d 80, the Tenth Circuit held that a creditor who had filed his claim in the individual bankruptcy of Chapman as an individual creditor of the bankrupt and shared pro rata in the individual bankrupt's assets, was judicially estopped from later asserting that the obligation was, in fact, a partnership obligation for which Merrill, the alleged non-bankrupt partner, could be held responsible in an independent action subsequently instituted against him. In its comprehensive opinion, the Tenth Circuit declared:

> "Appellant has formerly asserted a right to share in the individual estate of a bankrupt partner on an equal basis with other individual creditors. * * * Having thus recognized Merrill as a creditor of the Chapman estate and having thus declared itself to be a creditor of Chapman individually through its acceptance of dividends to the detriment of other general creditors, it must be held estopped to now claim that the obligation due it was a partnership obligation."

The provisions of the Bankruptcy Act, 11 U.S.C. § 23 (g), to which the Court of Appeals referred, provides that:

> "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of such partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such sur-

> plus shall be added to the partnership assets and be applied to the payment of the partnership debts."

Under the foregoing provisions of the Bankruptcy Act, the distinction between an individual and a firm indebtedness is a matter of substance. In the language of this Court in *Schall* v. *Camors,* 251 U. S. 239, at 255: "Hence the distinction between individual and firm debts is a matter of substance, and must depend upon the essential character of the transactions out of which they arise."

In determining whether an indebtedness claimed by a creditor is an indebtedness of the partnership or an independent and separate indebtedness of an individual partner, the nature of partnership liability must be borne in mind. A distinction must be drawn between the liability imposed upon each member of a partnership as an incident and consequence of partnership law, and the separate liability of a partner created by his independent and individual jural act, i.e., an individual endorsement, an individual guarantee or an individual undertaking. The distinction was emphasized by the New York Court of Appeals in *Ruzicka* v. *Rager,* 305 N. Y. 191, 199 in the following words:

> "To some degree the individual liability of a partner is not the ordinary individual l[i]ability of one who obligates himself as an individual. Rather, the individual liability of a partner is merely an incident of the partnership liability. Judge POUND writing for the court in Hartigan v. Casualty Co. of America (227 N. Y. 175, 178, supra) phrased the conception clearly and concisely as follows: 'When a partnership is established, the liability of the individual partners is an incident of the partnership, merely, not a separate and independent liability.' "

Under bankruptcy law, if the basis of the liability sought to be imposed upon the individual partner is a partnership or joint venture indebtedness, and the individual partner is sought to be held therefor under partnership law, the creditor cannot file a claim against the individual bankrupt partner as an individual obligor. He can only file a claim against the individual bankrupt partner as a creditor of the partnership. In so doing, he must subordinate his claim to those of individual creditors of the partner and can only share in the surplus, if any, which might remain, after the individual creditors of the individual partner have been satisfied in full.

Thus, in *Schall* v. *Camors,* 240 Fed. 6, aff'd by this Court in 251 U. S. 239, the decision cited by the Court in the *Eads* case, *supra,* a creditor sought to file a claim against the individual estate of an individual bankrupt partner. He attempted to justify the filing upon the ground that the individual bankrupt was liable under partnership law for all of the obligations of the partnership. The Court pointed out that the partners in the transaction had not obligated themselves separately and independently and that, in the absence of a separate and individual obligation, the mere existence of liability under partnership law would not warrant or support the filing of a claim against the estate of an individual partner upon a partnership obligation. The Court ruled:

> "Each partner and his property are individually liable for all partnership debts as between him and the partnership creditor, and this obligation is joint and several at the option of the creditor. ***But as between his individual and partnership creditors, under the Bankrupt Law, the primary liability of his property is to the former.*** It would be contrary to the policy of the Bankrupt Law to permit the firm cred-

itor, by invoking such a technical rule of law, to place himself on a parity with the individual creditors of the partners as to his individual assets, and so circumvent the equitable distribution of partnership assets among firm and individual creditors provided for in the act."

The foregoing rules of law have been rigorously applied even where a judgment has been obtained in the state courts, under partnership law, against individual partners because of their liability, under state law, for partnership debts. *In re F. J. Hacker & Co.*, 225 Fed. 869, the Waterloo Register Company, a corporation, recovered judgments against the partnership and the individual members thereof upon a partnership obligation. It then filed those judgments against the individual estates of the bankrupt partners, asking that they be allowed as unsecured claims against the individual estates and that it be permitted to share in the assets of such estates equally with the individual creditors of such partners. The District Court refused to allow the claim. In affirming the District Court, the Court of Appeals for the Eighth Circuit, in 238 Fed. 146, ruled as follows:

"The indebtedness to the appellant was primarily that of the partnership. The partners had not individually contracted to pay it, and the judgments against them were but the legal conclusion from their relation to the firm. *The judgments against the partners, as well as the partnership, did not change the inherent character of the indebtedness.* While merger in judgment is the general rule, yet according to recognized exceptions the judgment will be construed as a new form of the old debt when justice and equity require. The incident of the old debt will be carried

forward to prevent the inequitable destruction of a right, privilege, or exemption."

A decision by the Court of Appeals for the Fifth Circuit is likewise in accord. *In re Hurley Mercantile Co.*, 56 Fed. 2d 1023, a bank procured a judgment against a partnership upon a promissory note executed by the partnership. A judgment was likewise rendered against the individual partners because of their liability therefor under State law. The bank filed a claim, based upon the judgment, against the individual partner in his individual bankruptcy proceedings. In refusing to allow the claim, the Court of Appeals affirmed the Referee's ruling to that effect as follows:

> "The referee's ruling was right. It is true that each partner is individually liable for every partnership debt, but for purposes of bankruptcy the partnership with its property and debts is considered a separate entity from the partners with their several estates and creditors. The Bankruptcy Act requires them to be kept separate for administration, and that partnership assets be first applied to partnership debts. Bankr. Act Section 5 (11 USCA Section 23).
>
> * * * Any other holding would disregard the requirement of Bankr. Act Section 5f, 11 USCA Section 23 (f), that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each partner to the payment of his individual debts."

Under the foregoing authorities, it is indisputably clear that the final judgment procured by Mosher against IMI in the IMI bankruptcy proceeding constituted an irrevocable determination that the IMI purchase orders of No-

vember 3, 1961 created a primary and individual obligation of IMI, and not an obligation of the joint venture.

Mosher has shared in the individual assets of IMI, as an individual creditor of IMI, pro rata with all other individual creditors of IMI, upon an obligation created by the purchase orders of November 3, 1961 which it claimed to be the separate, individual and independent obligation of IMI. It cannot now, in this action, escape the consequences of the position which it then took, and the judgment which it obtained in the IMI bankruptcy proceedings, by advancing the completely contrary argument that the obligation upon these purchase orders did not create an individual obligation of IMI, but rather a joint venture obligation, and that IMI was, in any event, liable for that indebtedness as a member of the joint venture. The liability imposed upon IMI as a joint venturer, under partnership law, could not possibly have justified the individual judgment and recovery obtained by Mosher as an individual creditor of IMI in IMI's individual bankruptcy proceeding.

By procuring a final judgment in the bankruptcy proceeding and availing itself in full of the benefits provided therein, Mosher irrevocably elected to treat the indebtedness for its deliveries to the Tucson and Vandenberg jobs as a separate and independent indebtedness of IMI, and not as an indebtedness of the joint venture. Its present position would constitute a fraud upon all of the individual creditors of IMI whose claims against IMI individually were diminished by the distribution made to Mosher as an individual creditor of IMI.

Upon the undisputed facts herein, and the authorities applicable thereto, it is plain that only one conclusion can be reached upon this record, to wit, that Mosher is barred, estopped and forever precluded from asserting any liabil-

ity against the joint venture, or Ward as a member of the joint venture, upon the ground that the joint venture and not IMI individually was liable for the plaintiff's debt. In the language of this Court in *Gardner* v. *New Jersey,* 329 U. S. 569, at 572: "It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance *must abide the consequences of that procedure.*"

2. The Statutory Scheme Of Distribution Embodied In The Bankruptcy Act, 11 U.S.C. § 23 (g), Cannot Be Circumvented And Annulled By The Device Of Including In The Proof Of Claim Filed By An Individual Creditor Upon The Individual Obligation Of An Individual Bankrupt The Statement That It Was Being Filed "without prejudice" To The Creditor's Right To Recover Against A Non-Bankrupt Partner Or Joint Venturer Upon The Ground That The Obligation Was In Fact A Partnership Or Joint Obligation.

In its opinion, the Court of Appeals has held that *Eads Hide & Wool Co.* v. *Merrill,* 257 F. 2d 90 (10th Cir. 1958) was not applicable to the instant case because, in the bankruptcy proceedings, Mosher had filed its claim "without prejudice to its rights against the said Ward Industries Corporation. . . ." Consequently, according to the Court of Appeals Opinion, Appendix A, p. 9a:

> "Moreover, Mosher did not assume different positions as to the facts in that proceeding and in this. It is not for us to say whether the decision allowing Mosher's claim in the bankruptcy proceeding was correct. We do hold that Mosher's full disclosure and express retention of rights in that proceeding preclude an estoppel against Mosher in this litigation."

In effect, the Court of Appeals has ruled that the provisions of the Bankruptcy Act and the scheme of distribution provided for therein, may be totally circumvented by the simple expedient of filing a claim in the individual bankruptcy and adding thereto the words "without prejudice". The Congressional scheme of distribution embodied for decades in 11 U.S.C. § 23 (g) cannot be so easily destroyed.

The fact of the matter is that, contrary to the opinion of the Court of Appeals, Mosher has assumed an entirely different and contradictory position upon the facts in this litigation than it adopted in the bankruptcy proceedings. In the bankruptcy proceedings, it established to the satisfaction of the Court that the obligation of IMI upon the purchase orders of IMI was an individual obligation of IMI for which it was entitled to file a claim as an individual creditor of IMI. In the present litigation, it has asserted that the self-same purchase orders were not purchase orders of IMI but purchase orders of the joint venture which created a joint venture obligation rather than an individual obligation of IMI. The latter position constitutes the entire evidentiary base of Mosher's cause of action against Ward in this lawsuit. It is the position sustained by the District Court in its findings of fact, conclusions of law and final judgment against Ward (R 1229, 1239, 1241). It is the position affirmed by the Court of Appeals herein.

In the bankruptcy proceeding, the Bankruptcy Court was not dealing with the propriety, sufficiency or validity of Mosher's claim against Ward as a member of the joint venture. It was dealing solely and only with the issues and proofs submitted to it by Mosher as a claimant in the bankruptcy proceedings. Upon those proofs, it rendered its judgment after a "hearing before the Court"

and "the issues having been duly tried. . . ." (R. 680). In that proceeding, Mosher established as a juridically conclusive fact that the obligation created by the IMI purchase orders was an individual obligation of IMI.

Whether that decision was juridically sound or not, and the Court of Appeals seems to intimate in its opinion that it was not, is utterly beside the point. The judgment was in fact entered upon the claim of Mosher *as an individual creditor;* the benefits were in fact received by Mosher *as an individual creditor;* and the *individual obligation of IMI to Mosher* was in fact "extinguished and satisfied in full".

The Bankruptcy Court did not by its determination provide any judicial sanction for the subsequent assertion in this lawsuit of Mosher's claim against Ward as a joint venturer. It was not within its jurisdiction or power to do so. It merely relegated to this action whatever rights Mosher chose to assert, leaving it to the District Court in this lawsuit to determine whether any such rights did in fact exist. Consequently, Mosher's so-called "disclosure and express retention of rights" in the bankruptcy proceeding did not preclude, as the Court of Appeals has held, a judicial estoppel against Mosher in this litigation.

The ruling of the Court of Appeals in this regard will totally extinguish and destroy the Congressional scheme of distribution provided by the Bankruptcy Act. It will permit a creditor to do what the Congress has said he cannot do, to claim as an individual creditor upon an individual obligation of a bankrupt partner or joint venturer and then, having shared in the individual assets of the bankrupt equally with all other individual creditors, to proceed upon the basis that the identical obligation did not in fact constitute an individual obligation, but a joint venture obligation for which the non-bankrupt partner or

joint venturer could still remain liable. Such a holding is in total conflict with the Bankruptcy Act, the *Eads* decision, *supra,* and the innumerable decisions of this Court and the Court of Appeals which have repeatedly, over decades, sustained and enforced the scheme of distribution embodied by the Congress in 11 U.S.C. § 23 (g). Unless reversed, the decision of the Court of Appeals herein, will effectively nullify that scheme of distribution.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the within petition for a writ of certiorari be granted by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals For the Ninth Circuit

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21,307, No. 21,307 A, No. 21,307 B, No. 21,307 C

FLUOR CORPORATION, LTD., et al., UNION TANK CAR COMPANY, WARD INDUSTRIES CORPORATION,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, ex rel. MOSHER STEEL COMPANY,

Appellees and Cross-Appellants.

[January 6, 1969]

Appeal from the United States District Court for the District of Arizona

Before:

HAMLIN, BROWNING, and ELY,

Circuit Judges.

BROWNING, *Circuit Judge*:

The district court rendered judgment in favor of Mosher Steel Company and against the various appellants for prices agreed to be paid for materials furnished and services rendered by Mosher in the fabrication of steel used in the construction of missile launch facilities in

Arizona and California.[1] We affirm the trial court's judgment except as it denied prejudgment interest. As to this, we reverse and remand for further proceedings.

Appellants strongly attack many of the trial court's findings. We have, therefore, examined the record with care. We find substantial conflicts in the testimony and the documentary evidence, and even stronger differences in the construction that the parties urge should be placed on events leading to the litigation and the inferences that should be drawn from them.[2] We have not asked ourselves whether we would have resolved the conflicts and ambiguities as the trial judge did, or whether we would have drawn the same inferences. *United States* v. *Real Estate Boards,* 339 U.S. 485, 495-96 (1950). We have, however, satisfied ourselves that upon an examination of the entire evidence we are not "left with the definite and firm conviction that a mistake has been committed" in any of the trial court's findings. *United States* v. *U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948); *see Commissioner* v. *Duberstein,* 363 U.S. 278, 291 (1960). We therefore accept the trial court's findings, and base the statements of fact in this opinion upon them.

Fluor Corporation, Ltd., was the prime contractor for the construction of the Arizona launch facilities, and the insurance company appellees were sureties on Fluor's performance bond. Matich Bros. and M. M. Sundt Construction Corp., who are not parties to this litigation,

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[1] Prior litigation in this court arising out of these projects is reported in Dragor Shipping Corp. v. Union Tank Car Co., 361 F.2d 43 (1966); 371 F.2d 722 (1967); 378 F.2d 241 (1967).

[2] The parties are well aware of these conflicts and differences; they have explored them in great detail in their briefs. No useful purpose would be served by publishing them here.

were the prime contractors for the California launch facilities.

Fluor and Matich & Sundt entered into separate first tier subcontracts with Union Tank & Mfg. Co.[3] Union, in turn, entered into second tier subcontracts for steel fabrication work with IMI-Ward, a joint venture created by Idaho-Maryland Industries Inc. and Ward Industries Corporation.

When IMI-Ward fell behind schedule in the performance of its subcontract, Union, on October 10 or 11, 1961, instructed an IMI-Ward official to "farm out" the steel fabricating work, and approved the selection of Mosher to perform it. Because the IMI-Ward official did not think Mosher would accept an IMI-Ward purchase order, Union agreed that if a satisfactory contract could be worked out with Mosher, Union would give Mosher a Union purchase order.

On October 13, the IMI-Ward official negotiated a detailed contract with Mosher for required work. As anticipated, Mosher would not accept IMI-Ward's credit. The IMI-Ward official then advised Mosher that Union purchase order would be issued. On October 16, Mosher set out the agreed-upon terms in a letter addressed to the IMI-Ward official. That official signed the letter on behalf of Union and sent copies of the executed writing to Union. Mosher then began performance of the work.

Union told Mosher on October 23 that Union's purchase order would be issued within two or three weeks, and that the October 16 letter would serve as an interim purchase order until the formal purchase order could be mailed.

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[3] Union acted principally through a division known as Graver Tank & Mfg. Co., and the trial court's findings refer to "Union" and "Graver" interchangeably.

Thereafter, on October 31, IMI-Ward asked Mosher, as a matter of accounting convenience for IMI-Ward, to change the designated customer on the job from Union to IMI-Ward, and to accept IMI-Ward purchase orders in place of those of Union. Mosher agreed, provided Union would be responsible for payment.

IMI-Ward sent Mosher two purchase orders on November 3 covering the work to be done. Mosher informed Union that completed material would not be shipped until Mosher received confirmation that Union would be responsible for payment.

On November 15, after securing IMI-Ward's approval, Union advised Mosher that Union would pay Mosher directly and deduct the payments from the amounts Union was to pay IMI-Ward under the latter's subcontract.[4] Mosher understood, and Union intended Mosher to understand, that its commitment extended to all the work covered by IMI-Ward's purchase orders of November 3. Upon receiving Union's commitment, Mosher changed the customer's name from Union to IMI-Ward, completed the work, and delivered the fabricated steel to the job sites.

On February 2, 1962, IMI filed a voluntary petition under Chapter 11 of the Bankruptcy Act. Mosher sub-

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[4] The commitment was given orally. Union told Mosher that it would be confirmed by a subsequent letter. Although the letter was prepared by Union, it was not sent because Mosher continued to make shipments without it. Union argues that the sending of this letter was intended to be condition precedent to the formation of a contract, and that the trial court's finding to the contrary is clearly erroneous. We think the finding is supported by evidence from which the trial court could conclude that the promised letter was intended to be a written confirmation of an agreement already reached. Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng'r Corp., 305 F.2d 659, 664-65 (9th Cir. 1962), upon which Union relies, is inapplicable for this reason.

mitted a proof of claim in these proceedings, and it was issued IMI stock under a plan of reorganization. Except for this stock, Mosher was not paid for its work.

The district court gave judgment against Union, finding that the commitment Union gave Mosher on November 15 and Mosher's completion and delivery of the work thereafter created a contract between Union and Mosher obligating Union to pay Mosher directly. Judgment was rendered against Fluor and its sureties under the Miller Act, 40 U.S.C. § 270.[5] The district court entered judgment against Ward on the ground that IMI-Ward's November 3 work orders and Mosher's fabrication and delivery of material pursuant to such orders created a contract between Mosher and IMI-Ward obligating Ward to pay Mosher in accordance with the terms and conditions of those orders.

Union contends that Mosher performed the work for IMI-Ward; that Union's agreement, if any, was only a guarantee to pay Mosher if IMI-Ward did not; and, being oral, this agreement to answer for the debt of another was unenforceable under the Statute of frauds.

Ward, on the other hand, contends that the only viable contract was an oral agreement between Mosher and Union arising on October 13, binding Mosher to perform the work and Union to pay for it. If there was a November agreement between Mosher and IMI-Ward, Ward argues, it required nothing of Mosher which Mosher was not already obligated to do under its October agreement with Union, and, therefore, any promise by IMI-Ward was not supported by consideration. Furthermore, the only

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[5] Since Fluor was not involved in the California project, the judgment against Fluor and its sureties was limited to the amount due for materials used in the construction of the Arizona facilities.

consideration for which Mosher bargained was Union's unconditional promise to pay Mosher directly. Consequently, any promise by IMI-Ward was not bargained for and hence was unenforceable under our decision in *Colorado Nat'l Bank of Denver* v. *Boehm,* 286 F.2d 494 (1961).

As we read the district court's findings, the court determined that *both* Union and IMI-Ward assumed direct obligations to pay Mosher for the work. IMI-Ward contracted directly with Mosher to have Mosher perform the work described in the November 3 work orders in return for payment by IMI-Ward of the prices fixed in those orders. This agreement was subject, however, to the condition precedent that Union also agree to be directly liable for payment. When Union agreed to pay Mosher, it became directly bound to Mosher. Union's promise also satisfied the condition precedent to the direct contractual obligations between IMI-Ward and Mosher.[6]

In view of Union's obligations under its subcontract with Fluor and Matich & Sundt, Union had a substantial interest in assuring performance of the work by Mosher. As the district court found, "in agreeing to pay Mosher directly, [Union] . . . acted primarily to protect and advance its own interests under its subcontracts. . . ." Since Union's promise to pay was a direct and original undertaking rather than a collateral promise to pay IMI-Ward's debt, it was not within the Statute of Frauds,

[6] Ward argues that no agreement arose because Mosher rejected an element of IMI-Ward's initial offer, namely, that IMI-Ward's credit be substituted for that of Union. There was substantial evidence supporting the trial court's findings that IMI-Ward agreed to Mosher's counter-offer to accept IMI-Ward work orders and to substitute IMI-Ward for Union as the account customer if Union would agree to pay for the work.

even though IMI-Ward was also obligated to pay for the work. *Holmes* v. *Suffrin,* 198 Ill. App. 45 (1916); *Peters* v. *Raven,* 159 Ill. App. 122 (1910); *Leisman & Co.* v. *Otto,* 64 Ky. (1 Bush) 225 (1866); *cf. Granite City Lime & Cement Co.* v. *Board of Educ. of School Dist. 126,* 203 Ill. App. 134 (1916). See 4 Corbin on Contracts § 926, p. 705.[7]

As to Ward's argument that any promise made by Ward to Mosher in November was without consideration because of Mosher's pre-existing contractual obligation to perform the same work for Union, it should be noted that the district court did not conclude that a Union-Mosher contract arose in October. Even if such a prior Union-Mosher contract existed, IMI-Ward's subsequent promise would still have consideration. Under the arrangement finally agreed to, Mosher, at IMI-Ward's solicitation, undertook the additional obligation to designate IMI-Ward, rather than Union, as the customer, and to accept the IMI-Ward purchase orders. These new undertakings were sufficient to support IMI-Ward's promise to pay.[8]

Ward's reliance upon *Colorado Nat'l Bank of Denver* v. *Boehm, supra,* 286 F.2d 494, is also misplaced. Mosher's

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[7] Union also contends that its commitment was limited to materials produced for use in constructing the Arizona launch facilities. Although the testimony of one witness might be read as supporting the limitation for which Union argues, as Mosher points out, there was other evidence supporting the trial court's finding that Union's commitment covered payment for all of the work Mosher was to do—whether used in construction of the Arizona facilities or those in California.

[8] The basis for IMI-Ward's interest in these arrangements is suggested by the district court's finding that the prices which IMI-Ward had agreed to pay Mosher for the work were lower than those which IMI-Ward would collect from Union for the work.

insistence upon a direct commitment from Union does not mean that this was the only consideration for which Mosher bargained. Mosher also sought and obtained a promise of payment from IMI-Ward. The fact that IMI-Ward's promise alone was not enough to satisfy Mosher, or that Union's promise alone might have been sufficient, is irrelevant. *See Granite City Lime & Cement Co.* v. *Board of Educ. of School Dist. 126, supra,* 203 Ill. App. 134; *Peters* v. *Raven, supra,* 159 Ill. App. 122; Restatement of Contracts §§ 111, 113.

Ward contends that Ward is not liable even if IMI is, because the extension of credit or the delivery of goods to one member of a joint venture does not obligate the joint venture. The cases upon which Ward relies involve the assumption of liability by a joint venturer beyond the scope of his authority to act for the joint venture.[9] Here, however, the district court concluded on the basis of findings supported by substantial evidence that IMI's acts were authorized by and performed on behalf of the IMI-Ward joint venture.

Both Union and Ward argue that because Mosher filed a claim in the IMI bankruptcy proceedings representing that the amount due Mosher was an unsecured independent obligation of IMI, and because Mosher accepted a distribution of the stock of the reorganized debtor on the basis of this claim, it is estopped from asserting that Union and Ward are liable. The result urged by Union and Ward can obtain only if it is required by some legal fiction for Mosher in its proof of claim against IMI explicitly re-

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[9] *See,* for example, Wreen v. Moskin, 226 App. Div. 563, 235 N.Y.S. 405 (1929); American Mut. Life Ins. Co. v. Hanna, Zabriskie & Daron, 297 Mich. 599, 298 N.W. 296, 299 (1941); and Matanuska Valley Bank v. Arnold, 223 F.2d 778 (9th Cir. 1955).

served its rights against Ward, Union, Fluor, and the sureties.[10]

Thus, unlike the claimant in *Eads Hide & Wool Co.* v. *Merrill,* 252 F.2d 80 (10th Cir. 1958), which is relied on by Ward and Union, Mosher did not in the bankruptcy proceedings elect the remedy of recovery against only one of the allegedly liable parties. Moreover, Mosher did not assume different positions as to the facts in that proceeding and in this. It is not for us to say whether the decision allowing Mosher's claim in the bankruptcy proceeding was correct. We do hold that Mosher's full disclosure and express retention of rights in that proceeding precluded an estoppel against Mosher in this litigation.[11]

In addition to defending against Mosher's claim, Union filed a counterclaim alleging that if it were liable at all it would be as a surety only, and praying that Mosher be required to seek satisfaction first from Ward. In its findings and conclusions the trial court did not refer expressly to Union's counterclaim. When the omission was called to the court's attention, the court entered a judgment that Union "take nothing by its counterclaim." Union contends that the existence of a principal-surety relationship not

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[10] Mosher's claim in the bankruptcy proceeding stated: "Claimant corporation claims that Ward Industries Corporation, as joint venturer with the Debtor, and Union Tank Car Company through its division, Graver Tank & Mfg. Co., are also liable to claimant corporation for the entire said debt, ... Claimant corporation's filing of the claim in this proceeding is made without prejudice to its rights against the said Ward Industries Corporation, and the said Union Tank Car Company . . . . In addition . . . claimant corporation has claimed that Fluor Corporation Ltd. and its sureties are liable . . . ."

[11] Mosher will not obtain double recovery. In computing the amount of the judgment, the trial court deducted the stipulated value of the stock received by Mosher in the bankruptcy proceeding.

only was admitted in Mosher's answer to Union's counterclaim but was established by the evidence, and that, in any event, the district court erred in disposing of the counterclaim without entering findings of fact and conclusions of law as required by Fed. R. Civ. Proc. 52(a).

The purpose of Rule 52(a) is satisfied if the trial court's findings are sufficient to afford a clear understanding of the ground upon which the court based its judgment. *Seligson* v. *Roth*, ... F.2d ..... (9th Cir. 1968). It is apparent to us that the trial court rejected Union's counterclaim because it found Union's relationship to the debt to be that of a direct obligor, not a surety. Contrary to Union's contention, Mosher did not admit in its pleadings that Union was merely a guarantor;[12] and, as we have said, the trial court's finding that Union agreed to a direct and primary obligation is not clearly erroneous.

On the basis of this finding we also reject the contention advanced by Fluor and its sureties that Mosher was not a "person having a direct contractual relationship with a subcontractor" of Fluor within the meaning of 40 U.S.C. § 270(b). We are not convinced that recognition of Mosher's claim will extend the coverage of the Miller Act beyond that intended by Congress, nor that the result will be to "impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself." *MacEvoy* v. *United States*, 322 U.S. 102, 110 (1944). Fluor could easily have protected itself by

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[12] In its answer to Union's counterclaim, Mosher admitted that it had alleged in the complaint that Union was a surety, but Mosher also stated "the amended Complaint includes other counts and allegations as therein set forth." These "other counts and allegations" of Mosher's complaint asserted that Union was directly liable to Mosher for the debt. "A party may . . . state as many separate claims . . . as he has regardless of consistency . . . ." Fed. R. Civ. Proc. 8(e)(2).

requiring appropriate security from Union. *See Hill* v. *American Surety Co.*, 200 U.S. 197, 204-05 (1906); *Mankin* v. *Ludowici-Celandon Co.*, 215 U.S. 533, 540 (1910).

We turn to Mosher's cross-appeal from the portion of the judgment which denied prejudgment interest on the amount found to be due under the contracts.

There is some disagreement among the parties as to whether the governing law is that of the state of the forum (Arizona) or of the states in which the contracts were to be performed (Arizona and California). Since there is nothing to indicate that the relevant law of the two states differs, we have not concerned ourselves with the problem. The California rule is stated in section 3287, California Civil Code, "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . ." Arizona follows the same general rule.[13]

Cross-appellees argue that Mosher's damages were not "certain or capable of being made certain by calculation" prior to judgment because of the disputed value of the

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[13] The California statute was enacted in 1872, and states the common-law rule. Restatement, Contracts § 337(a). Arizona has not codified the rule, but it is followed by the courts of that state. United States Fidelity & Guar. Co. v. California-Arizona Constr. Co., 21 Ariz. 172, 186 Pac. 502, 509 (1920); Palmcraft Dev. Co. v. Phoenix, 46 Ariz. 400, 51 P.2d 921 (1935); Schwartz v. Schwerin, 85 Ariz. 242, 250, 336 P.2d 144, 149 (1959); Feighner v. Clarke, 2 Ariz. App. 286, 408 P.2d 219, 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P.2d 513 (1966) (in banc); Betz v. Goff, 5 Ariz. App. 404, 406, 427 P.2d 538, 540 (1967).

A recent addition to the California statute provides that where an unliquidated contract claim is involved interest may be awarded, in the court's discretion, for some or all of the period between the filing of suit and entry of judgment. Calif. Stats. 1967, ch. 1230, § 1.

IMI stock which Mosher received in partial payment of its claim in the IMI bankruptcy proceedings. The dispute over the stock's value was not resolved until the parties stipulated to its worth during the course of trial.[14]

Clearly, this circumstance did not render the amount of Mosher's claim uncertain until it arose. At a minimum, therefore, Mosher was entitled to prejudgment interest on the whole amount owing under the contracts from the date it became due (thirty days after February 28, 1962) to the date Mosher received the stock in partial payment.

It is equally apparent that Mosher was not entitled to interest after the latter date upon the portion of his claim which had been paid. But uncertainty about the precise value of the partial payment should not bar Mosher from compensation for the continued loss of the use of the much larger balance remaining unpaid. Interest on the difference between the amount due Mosher under the contracts and the value of the stock as determined at trial should be allowed from the date the stock was received to the date of judgment. Although we have found no decisions directly on point, this result is supported by analogous authorities.

Thus, even though the existence of an unliquidated counterclaim or set-off necessarily puts the amount pay-

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[14] Cross-appellees also intimate that Mosher should be denied pre-judgment interest because the issue of liability was disputed. The generally accepted rule is that uncertainty as to liability, as distinguished from uncertainty as to the amount of the damage, does not bar recovery of prejudgment interest. Restatement, Contracts § 337(a), comment d. Despite disputed liability, prejudgment interest was awarded in both Feighner v. Clarke, 2 Ariz. App. 286, 408 P.2d 219, 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P.2d 513 (1966) (in banc); and Betz v. Goff, 5 Ariz. App. 404, 406, 427 P.2d 538, 540 (1967). California cases to the same effect are collected in 5 U.C.L.A. L. Rev. 262, 266 n. 28 (1958).

able in doubt, it is well settled that it does not render the claim itself uncertain or deprive the claimant of the right to prejudgment interest.[15] If the unliquidated set-off or counterclaim is based upon a breach unrelated to the sum due under the primary claim, interest is allowed on the entire claim. The amount of the counterclaim or set-off as determined at trial is then deducted from this total. If, as in the present case, the unliquidated set-off or counterclaim constitutes a partial payment of the primary claim, interest is allowable on the balance due after deducting the amount of the set-off or counterclaim as determined at trial.[16]

The result we reach is also supported by the principle recently applied in *Coleman Eng'r Co.* v. *North American Aviation,* 55 Cal. Rep. 1, 420 P.2d 713 (1967). There, defendant argued that prejudgment interest was barred because a lesser amount of damages was awarded than plaintiff had originally demanded. The reduced claim resulted from the plaintiff's successful efforts in obtaining

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[15] Hansen v. Covell, 218 Cal. 622, 631-32, 24 P.2d 772, 775, 89 A.L.R. 670 (1933) (in banc); McCowen v. Pew, 18 Cal. App. 482, 483 *et seq.*, 123 Pac. 354, 355-56; Hunt Foods v. Phillips, 248 F.2d 23, 26-27 (9th Cir. 1957) (Calif.). Other California decisions are collected in 14 Cal. Jur. 2d 79, 705-06, and 5 U.C.L.A. L. Rev. 262, 268 n. 37 (1958). *See also* Mall Tool Co. v. Far West Equip. Co., 45 Wash. 158, 273 P.2d 652, 663 (1954); Sam Macri & Sons, Inc. v. United States, 313 F.2d 119, 129-30 (9th Cir. 1963); American Sur. Co. v. United States, 368 F.2d 475, 479-80 (9th Cir. 1966); 5 Corbin, Contracts § 1046, p. 286, § 1051, pp. 305-06. "In short," Professor McCormick states, "it is the character of the claim and not of the defense that is determinative of the question whether an amount of money sued for is a 'liquidated sum.'" McCormick on Damages, § 54 p. 216 (1935).

[16] Hansen v. Covell, 218 Cal. 622, 631-32, 24 P.2d 772, 775-76 (1933) (in banc); Hunt Foods v. Phillips, 248 F.2d 23, 26-27 (9th Cir. 1957) (Calif.); and cases collected at 14 Cal. Jur. 2d § 79, pp. 705-06.

settlements with third persons and in salvaging materials. The Supreme Court of California held that under these circumstances uncertainty as to the amount due did not bar an award of prejudgment interest. It stated, "we are satisfied that reductions in damages due to plaintiff's efforts to mitigate damages should not preclude an award of prejudgment interest. If the rule were otherwise, a plaintiff might be encouraged to forego opportunities to mitigate damages so as not to jeopardize his right to prejudgment interest." Similarly, Mosher's right to prejudgment interest should not be denied because Mosher in seeking and obtaining partial payment from a joint obligor reduced the amount of its claim against cross-appellees.

The judgments are affirmed on the appeals and reversed for further consideration on the cross-appeal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1179

UNION TANK CAR COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA, EX REL., MOSHER STEEL COMPANY, FLUOR CORPORATION, LTD., ET AL., AND WARD INDUSTRIES CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner, Union Tank Car Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on January 6, 1969.

CITATIONS AND OPINIONS BELOW.

The Arizona District Court rendered no opinion but entered findings of fact and conclusions of law which are printed in Appendix B hereto, *infra,* p. 3. The opinion of the Court of Appeals is not yet reported but is printed in Appendix B hereto, *infra,* p. 24.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 6, 1969 (Appendix B hereto, *infra*, p. 37). Petitioner filed a timely petition for rehearing which was denied on February 11, 1969, Judge Ely voting for rehearing on the issue of prejudgment interest (Appendix B hereto, *infra*, p. 38). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).[1]

QUESTIONS PRESENTED.

1. Whether a debt of a bankrupt joint venturer arising out of joint venture business constitutes a partnership debt within the meaning of Section 5 (g) of the Bankruptcy Act.

2. Whether a creditor securing a recovery out of the individual estate of a bankrupt joint venturer on the representation that its claim is an individual debt of the bankrupt, is estopped to assert in a subsequent action brought against other persons allegedly liable for the same debt, that the claim was, in fact, a joint venture and not an individual obligation.

3. When a diversity action is brought against several defendants on a contract claim for relief and one defendant is a surety for another, may the surety defendant invoke a statute of the forum state which requires a Court to make findings on the suretyship issue, and order the plaintiff to levy execution upon the property of the principal before levying on the property of the surety?

4. Where the liability of a defendant depends solely upon whether a telephone conversation three years prior

1. Petitioner is informed that respondents Ward Industries Corporation and Fluor Corporation, Ltd. and its sureties, appellants-cross appellees below, also intend to file petitions for writ of certiorari.

to trial gave rise to an oral contract, may a District Court predicate a finding on the disputed testimony of an interested party to the conversation which is in conflict with contemporaneous documents that the Court makes no effort to explain or reconcile?

5. Whether in a diversity action, a Court of Appeals may award prejudgment interest on a claim which was disputed in amount where the law of the forum state prohibits such an award because the claim is not "capable of ascertainment by mere computation" at the commencement of suit.

STATUTES INVOLVED.

The statutory provisions and rules involved are Section 5(g) of the Bankruptcy Act, 11 U. S. C. § 23, Subd. (g); Arizona Revised Statutes, Sec. 44-142, Sec. 12-1642 and Sec. 12-1646; and Rule 52(a) of the Federal Rules of Civil Procedure. They are found in Appendix A, *infra,* pp. 1, 2.

STATEMENT OF THE CASE.

This action was instituted by the plaintiff, Mosher Steel Company, to recover $321,053.54 for fabricated steel used in the construction of missile launch facilities in Arizona and California. Of this amount $298,336.58 was sought from defendants Ward Industries Corporation, Union Tank Car Company and Fluor Corporation, Ltd. and its sureties, for fabricating and delivering steel used in the Titan II, Phase II missile launch work at Davis-Monthan Air Force Base, Tucson, Arizona. The balance of $22,716.96 was sought from defendants Ward and Union for fabricating and delivering steel used in similar work at Vandenburg Air Force Base, Lompoc, California (R 1680).[2] The

2. All page references in this petition to the record will be prefixed with the letter R; all page references to the reporter's transcript will be prefixed by the letters RT.

Arizona District Court entered judgment against both Ward and Union in the amount of $268,882.92 and against defendants Fluor and its sureties in the amount of $246-165.96. The District Court found that the Mosher claim was unliquidated and denied prejudgment interest (App. B, *infra,* p. 23).

The defendants appealed and Mosher cross-appealed on the issue of prejudgment interest. The Court of Appeals affirmed the judgment against defendants but reversed on the question raised by the cross-appeal, directing that the case be remanded to the District Court for the computation and award of prejudgment interest (App. B, *infra,* p. 36).

Missile Launch Construction.

In 1961 Fluor entered into a prime contract with the United States Government for Phase II construction on the Titan II missile launch facilities at Davis-Monthan Air Force Base, Tucson, Arizona. Matich Bros. and M. M. Sundt Construction Corp., who were not parties to this litigation, had also entered into a prime contract with the Government for Phase II work on the launch facilities at Vandenberg Air Force Base, Lompoc, California.

Fluor and Matich-Sundt thereafter subcontracted portions of the construction covered by their prime contracts to Union's Graver Tank & Mfg. Co. division (Jt. Ex. 2 and 4).[3] Union, in turn, entered into a second-tier subcontract (Jt. Ex. 8) with a joint venture composed of Idaho-Maryland Industries, Inc. and Ward Industries Corporation (Jt. Ex. 7). The second-tier subcontract provided that IMI-Ward would perform a substantial part of the steel fabrication covered by Union's contracts with Fluor

3. The letters Jt. Ex. refer to joint exhibits introduced in evidence pursuant to stipulation. The remaining exhibits introduced in evidence by Mosher, Ward and Union are respectively referred to as M. Ex., W. Ex. and U. Ex.

and Matich-Sundt, including the levels 2 and 3 and blast lock fabrication actually done by Mosher. It also provided that the joint venture would indemnify and save Union harmless on any claims asserted by joint venture subcontractors and materialmen (Jt. Ex. 8).

When IMI-Ward fell behind schedule on the Davis-Monthan project, the joint venture sought to farm out part of their steel fabrication to another company. Sam A. Wilson, an IMI division superintendent, suggested Mosher as a qualified fabricator who would be acceptable to Union.[4] George Morton, manager in charge of the IMI-Ward venture, told Wilson to meet with Mosher and report back to him what it would cost to have the work done (M. Ex. 39, p. 20; RT 997).

At an ensuing October 13, 1961 meeting Wilson reviewed the proposed levels 2 and 3 and blast lock fabrication with Mosher's officers (RT 66, 71). He also told them that a Graver purchase order would be forthcoming if a satisfactory deal could be negotiated (RT 191). Mosher submitted a proposal (M. Ex. 1) on this assumption but it was rejected by joint venture manager Morton who insisted that "at no time was Mosher to deal directly with Graver in the matter of this subcontract" (M. Ex. 39, p. 33). Union also objected when it learned of the proposal because the joint venture had no authority "to commit Graver to pull their chestnuts from the fire" (U. Ex. G).

Thereafter, IMI-Ward again met with Mosher and requested it to accept a joint venture purchase order for the Davis-Monthan work discussed with Wilson and also to accept a further purchase order for about $25,000 of addi-

4. The subcontract provided that all joint venture subcontractors and suppliers were subject to Union's approval. This provision was included because a similar contractual requirement was imposed upon Union by Fluor and Matich-Sundt and upon those prime contractors by the Government (Jt. Ex. 1-4). As a result Union was necessarily consulted whenever the joint venture engaged a subcontractor or supplier (RT 506-7).

tional fabrication for Vandenberg (RT 89, 796-7). Such purchase orders were prepared and sent to Mosher on November 3, 1961 (Jt. Ex. 9 & 10). The District Court found that Mosher told IMI it would accept the orders provided Union would also agree to be responsible for payment (App. B, *infra*, p. 12).

November 15th Telephone Conversation.

On November 15, 1961, when the first steel shipment for Davis-Monthan was ready, Mosher's treasurer Moore telephoned Graver's comptroller Page and told him that Mosher "had agreed to accept IMI-Ward's purchase order" but wanted assurance "that if we were not paid within the terms of the sale that [Graver] would be responsible" (RT 269, 355). According to Page, he advised Moore that Graver "would guarantee payment right then and there over the telephone of the one shipment that was ready" but as to "the rest of it I would consider and find out what I could do and write him a letter" (RT 742, 744-7, 759). Moore, on the other hand, testified that Page had flatly promised on behalf of Graver "to pay us direct and deduct it from the [IMI-Ward] contract" (RT 362).

Despite this conflicting account of the telephone conversation, the record shows as an undisputed fact that Page sent Moore a telegram the same day which read (Jt. Ex. 22):

> "Please accept this wire as guaranty of Idaho-Maryland payment to you on your November 16 shipment. Complete details will follow in letter early next week."

A letter was subsequently drafted for consideration by Union's officers on whether to extend the telegram guarantee to cover future shipments (Jt. Ex. 21). They decided against such an extension and agreed that any future requests by Mosher should be considered on a shipment-by-shipment basis (Jt. Ex. 24). Mosher made no further requests.

Invoices Covering Mosher's Work.

Following receipt of the joint venture purchase orders, Mosher entered supplements to its shop order for the Davis-Monthan work changing the customer's name from Graver to IMI (Jt. Ex. 13, RT 92). At the same time it entered an additional shop order in the name of IMI covering the separate fabrication work on the Vandenberg project (M. Ex. 22-A, RT 100).

From that date forward Mosher regularly invoiced the joint venture on all shipments made pursuant to IMI-Ward purchase orders (Jt. Ex. 14). At no time were any invoices sent Union or its Graver division (RT 397-8). In December, 1961 IMI advised Mosher that the latter's invoices were not billed by sites and levels as required under joint venture billing procedure (R 1235). Mosher rebilled the work and sent new invoices to IMI-Ward on or about January 19, 1962 (RT 367, 381). At no time were copies of these revised invoices sent to Union or its Graver division (RT 400-1, 397-8).

While the fabrication work was under way in its shop, Mosher also accepted numerous change orders from the joint venture increasing the dollar amount of the work being done under the November 3 joint venture purchase orders (Jt. Ex. 14, U. Ex. VVV-ZZZ, RT 129, 136). Once again, Mosher never gave Union or its Graver division notice of its acceptance of the change orders and never sent Graver any invoices thereon (RT 130, 424).

While Mosher was performing the steel fabrication for IMI-Ward, the joint venture regularly invoiced Graver on a percentage of completion basis for the work covered by its second tier subcontract (RT 520-21, 550-6, U. Ex. CCCC). The joint venture assigned its invoices, including those covering blast lock and levels 2 and 3 work under Section 4 of the subcontract (RT 555, U. Ex. T-Y), to the United California Bank (R 1235, RT 593). The bank

presented these invoices to Graver and received payment thereon (U. Ex. IIII).

IMI Bankruptcy.

On February 2, 1962 IMI filed a voluntary petition in bankruptcy under Chapter XI of the Bankruptcy Act (R 1235). Mosher submitted a $321,000 proof of claim in the proceeding on the representation that the work performed pursuant to the November 3 purchase orders was an individual debt of IMI (U. Ex. D). The Referee allowed the claim and ordered 642,107 shares of IMI stock issued to Mosher as a general unsecured creditor of IMI (U. Ex. E). IMI thereafter changed its name to Allied Equities Corporation and the stock was actually issued on a 1-20 reverse split whereby Mosher received 32,105 shares of Allied stock (R 1237). The value of the stock was established by trial stipulation at $52,170.62 (R 1237).

Institution of Suit.

After allowance of its bankruptcy claim, Mosher filed its complaint in the present action, alleging that Union as well as Ward was liable to pay for the fabricated steel (R 268-80). Union filed an answer denying that it had made any agreement or promise to Mosher beyond the November 15 telegram guarantee of the first steel shipment for Davis-Monthan. It further pleaded the statute of frauds and alleged that plaintiff was estopped to assert a claim against Union after representing to the bankruptcy court that the indebtedness sued upon was an individual responsibility of IMI, thereby obtaining a distribution to which it would not otherwise have been entitled by reason of the provisions of Sec. 5 (g) of the Bankruptcy Act (R 1098-9).

Union also filed a counterclaim against plaintiff which asked that the Court determine whether a principal-surety

relationship existed between Ward and Union with respect to the Mosher claim and in the event such relationship was found to exist and Union and Ward were each held liable to Mosher, that plaintiff be compelled first to seek satisfaction of its claim from Ward as the defendant primarily responsible for payment (R 295). The counterclaim relief was sought pursuant to provisions of Sec. 12-1642 and 12-1646 of the Arizona Revised Statutes.

Findings and Conclusions.

On May 24, 1966 the District Court entered findings of fact and conclusions of law holding that "Ward, as a member of IMI-Ward, is obligated to Mosher by reason of Mosher's performance of the terms and provisions on Mosher's part contained" in the November 3 purchase orders (R 1238). It also held that Page's telephone conversation with Moore on November 15, 1961 "constituted a contract and had the legal result of obligating Union to pay Mosher for all sums becoming due to Mosher" under the terms of the November 3 purchase orders issued by IMI on behalf of the joint venture (R 1238). Finally, it held Fluor and its sureties liable to Mosher under the provisions of the Miller Act, 28 U. S. C. § 270b, because of the "direct" contractual relationship which the Court found to exist between Union and Mosher (R 1237). The Court concluded that Mosher was not barred or estopped from recovery "by reason of its prosecution of its claim in the proceedings in the matter of the bankruptcy of IMI and its acceptance of the stock issued on its claim" (R 1237).

The District Court, however, failed to dispose of Union's counterclaim when entering its initial judgment on May 24, 1966. This fact was brought to the Court's attention, whereupon the Clerk, at the direction of the Court, entered a further judgment on June 20, 1966 (R 1345) "that the defendant Union Tank Car Company take nothing by its

counterclaim." The Court made no findings of fact or conclusions of law in dismissing the counterclaim.

These rulings, except with respect to the issue of prejudgment interest, have now been affirmed by the Court below.

I.

REASONS FOR GRANTING THE WRIT.

The Decision Below With Respect To the Estoppel Defense Conflicts With the Tenth Circuit's Decision in the Eads Case.

The decision of the Court below rejecting defendants' estoppel defense based on Bankruptcy Act § 5(g) is believed to be erroneous and in conflict with the decision of the Tenth Circuit in *Eads Hide & Wool Company* v. *Merrill,* 252 F. 2d 80. In the *Eads* case the Court held that plaintiff was estopped from maintaining suit on an alleged partnership obligation where he had previously represented that his claim constituted an individual debt of a bankrupt so as to secure a distribution out of the bankrupt's individual estate. It based its decision on the provisions of Bankruptcy Act §5(g) which treats a partnership as an entity for the purpose of distributing assets and provides for the payment of partnership debts solely out of the partnership property unless a surplus remains in a bankrupt's individual estate after all individual debts are paid.

The Court reasoned that the application of estoppel principles in such situations was the only effective means to prevent creditors from shifting between inconsistent individual and partnership claim positions in order to promote private financial interests at the expense of general creditors with bona fide claims to a bankrupt's individual estate. It declared, at p. 84:

"... Where a party assumes a certain position in a

> legal proceeding and succeeds in maintaining that position he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. . . .
>
> Appellant has formerly asserted a right to share in the individual estate of a bankrupt partner on an equal basis with other individual creditors. . . . [H]aving thus declared itself to be a creditor of Chapman individually through its acceptance of dividends to the detriment of other general creditors, it must be held to be estopped to now claim that the obligation due it was a partnership obligation."

The Court below recognized the pertinency of *Eads* but sought to distinguish the decision on the ground that Mosher purported to reserve its rights against Ward, Union, and Fluor and for the further reason that Mosher would not obtain a double recovery (App. B, *infra*, p. 31). The Tenth Circuit's decision however, did not turn upon these considerations but was based on the fact the plaintiff had successfully asserted his claim to be an individual debt of the bankrupt at the expense of other creditors who thereby unjustly suffered a proportionate reduction in their recovery.

The present case actually presents a stronger basis for an estoppel because unlike in *Eads,* Mosher's attempted reservation of rights establishes that the plaintiff was aware of the inconsistency of its position at the time of the bankruptcy proceedings. Moreover, in the IMI bankruptcy the debtor in possession sought to stay a distribution on Mosher's claim pending a determination of this action (M. Ex. 30). With knowledge of its inconsistent claims, Mosher nevertheless opposed the motion and secured an immediate distribution of shares to which it unquestionably was not entitled under its present theory of recovery.

Mosher also sought to convince the Court below that a

joint venture was not a partnership within the meaning of Bankruptcy Act § 5(g). While the Court did not expressly rule on this question, other decisions have held that a joint venture is to be so regarded. *In Re Taub* (2d Cir. 1924), 4 F. 2d 993; *In Re Kessler & Co.* (D. C. N. Y. 1909), 174 Fed. 906; *Nestor* v. *Joseph* (7th Cir. 1920), 265 Fed. 264. Because of the increasing prevalence of this form of business relationship, a decision of this Court clearly fixing its partnership status would be of importance in the administration of the bankruptcy laws.

II.

THE COURT BELOW, IN AFFIRMING DISMISSAL OF UNION'S COUNTERCLAIM, HAS DENIED PETITIONER EQUITABLE RELIEF CONTRARY TO ARIZONA LAW.

Union's counterclaim against Mosher sought equitable relief pursuant to Arizona Revised Statutes, §§ 12-1642 and 12-1646. Section 12-1642 provides that where a suit is brought against two or more defendants on a cause of action and one of the defendants claims to be a surety for the others, the defendant so claiming may have the surety issue tried by the Court. It further provides that if the defendant is found to be a surety, the Court shall order that any judgment rendered shall be enforced first from the assets of the principal before resorting to the property of the surety. Section 12-1646 further provides that the remedy made available to the surety exists regardless of whether the principal-surety relation is created by express contract or operation of law.

The District Court held that the counterclaim stated a claim upon which relief could be granted (R 1688) but nevertheless dismissed the same after trial without ruling on the suretyship issue or entering any findings of fact

or conclusions of law thereon. The Court below in affirming states (App. B, *infra*, p. 32):

> ". . . It is apparent to us that the trial court rejected Union's counterclaim because it found Union's relationship to the debt to be that of a direct obligor, not a surety . . . [A]s we have said, the trial court's finding that Union agreed to a direct and primary obligation is not clearly erroneous."

The Court below thereby credits the District Court with having made an implied finding based on the erroneous legal conclusion that once Union was found to be a direct and primary obligor liable to pay one and the same debt as Ward, petitioner was necessarily precluded from obtaining the statutory relief prayed for in its counterclaim.

Contrary to the Court's view, existence of the requisite surety relation for the purpose of the counterclaim does not depend upon the capacity in which Union and Mosher contracted with each other. It rather depends upon the relationship between Union and Ward. As co-obligors, Union and Ward may be found to have direct and indistinguishable obligations to Mosher; yet under established equitable priniciples of suretyship, if the relation between them requires that Ward rather than Union pay their common debt to Mosher, then a surety relation exists which Mosher must take into consideration in seeking satisfaction.

These principles were previously recognized by the Court below in *Howell* v. *War Finance Corporation* (9th Cir., 1934), 71 F. 2d 237, 243:

> ". . . 'The obligation of the surety may be indirect that another shall perform or direct that he will perform himself; he may be jointly bound or appear on the face of the writing as the sole debtor without his being on that account less a surety, or losing the equitable rights which belong to him in that capacity.' "

* * * * *

> "... 'It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two different capacities—as is often the case ... The relation is fixed by the arrangement and equities between the debtors or obligors ...' "

The identical equitable principles also find expression in the *Rest., Security* § 82 where suretyship is defined as "the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform." See also *Rest. Security* § 114 Comment a; *Rest. Contracts* § 92 Comment a, § 180 Comment e; 10 *Williston on Contracts* (3rd Ed. 1967) § 1211.

While these equitable principles have been codified in the statute law of Arizona, the Court below obviously gave no consideration to them because of its erroneous view of the law. But for this misconception we believe that the District Court's counterclaim decision would have been reversed and the requisite surety relation would necessarily have been found to exist between Union and Ward. The IMI-Ward subcontract required Ward as a joint venturer to perform the steel fabrication completed by Mosher. It further provided that the joint venturers would hold Union harmless from claims arising from the performance of work or furnishing of materials thereunder. Evidence was also introduced showing that Mosher was aware of the relationship between Union and IMI-Ward, that Union paid the joint venture for the work Mosher performed, and that after collecting neither Ward nor IMI paid the plaintiff in this case.

This was all the proof required to entitle petitioner to the relief clearly provided for under the provisions of Arizona

Revised Statutes Sec. 12-1642. Such relief is nevertheless denied because the Court below has given the statute a strict and narrow interpretation in conflict with its evident equitable purpose and intent.

III.

THE COURT BELOW, IN AWARDING MOSHER PREJUDGMENT INTEREST, HAS DECIDED AN IMPORTANT QUESTION IN CONFLICT WITH ARIZONA LAW.

It is uniformly agreed that when the jurisdiction of a United States court is based upon diverse citizenship, the law of the forum state is controlling on the allowance of prejudgment interest. See, *e.g.*, *St. Clair* v. *Eastern Air Lines, Inc.* (2nd Cir., 1962), 302 F. 2d 477. In the present case Mosher sued for $321,053.54 but recovered a judgment for only $268,882.92. Defendants obviously disputed the amount of plaintiff's claim as well as the matter of liability. The actual amount was only determined during the course of trial when plaintiff's counsel failed to produce admissible evidence as to the value of the IMI stock received on its bankruptcy claim whereupon the District Court induced the parties to arrive at a stipulated value to overcome this failure in proof (RT 449, 681).

While the District Court recognized Mosher's claim to be unliquidated, the Court below reversed this decision on the ground that the stipulation had the effect of liquidating the claim. It thereby holds that the defendants are subject to a substantial additional liability only by virtue of the act of their counsel in entering into a trial stipulation. This result is not only grossly inequitable but in square conflict with the law of Arizona which holds that prejudgment interest will not be allowed unless the amount of plaintiff's claim is "capable of ascertainment by mere

computation'' at the institution of suit. *U. S. F. & G. Co.* v. *Calif.-Ariz. Const. Co.*, 21 Ariz. 172, 186 Pac. 502; *Schwartz* v. *Schwerin*, 85 Ariz. 242, 336 P. 2d 144.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

The Statutes and Rules involved are:

Section 5(g) of the Bankruptcy Act, 11 U. S. C. § 23, subdivision (g), which provides:

> "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts and the net proceeds of the individual estate of each general partner to the payment of his individual debts. Should any surplus remain of the property of any general partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be distributed among the individual partners, general or limited, or added to the estates of the general partners, as the case may be, in the proportion of their respective interests in the partnership and in the order of distribution provided by the laws of the State applicable thereto."

Arizona Revised Statutes § 44-142 which provides:

> "*Actions against persons primarily and secondarily liable on bill of exchange or other contract.* The acceptor of a bill of exchange, or any other principal obligor on any contract may be sued either alone or jointly with any other party who may be liable thereon, but judgment shall not be given against such other party not primarily liable unless judgment has been previously or is at the same time, given against the acceptor or other principal obligor, except when the plaintiff discontinues his action against such principal obligor."

Arizona Revised Statutes § 12-1642 which provides:

> "*Determination of issue between principal and*

surety; and order of levy. A. When an action is brought against two or more defendants upon a contract, and one or more of the defendants are surety for the others, the surety may cause the issue of suretyship between the defendants to be tried and determined at any time before the trial, but such proceedings shall not delay the action of the plaintiff. B. If the issue is determined in favor of the surety, the court shall order the sheriff to levy the execution first upon the property of the principal which is subject to execution and situate in the county in which the judgment was rendered before a levy is made upon the property of the surety, if enough property of the principal is found as in the opinion of the sheriff or constable is sufficient to make the amount of the execution, otherwise the levy shall be made on so much property of the principal as is found, if any, and upon so much of the property of the surety as is necessary to make the amount of the execution. The clerk shall make a memorandum of such order on the execution."

Arizona Revised Statutes § 12-1646 which provides:

"The remedy provided in this article for sureties extends to endorsers, guarantors, drawers of bills which have been accepted, and every other suretyship, whether created by express contract or operation of law."

Rule 52(a) of the Federal Rules of Civil Procedure which provides in pertinent part:

". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the District of Arizona.

UNITED STATES OF AMERICA for the use and benefit of MOSHER STEEL COMPANY, and MOSHER STEEL COMPANY, *Plaintiffs,* *vs.* THE FLUOR CORPORATION, LTD., et al., *Defendants.*	No. Civil-1605 Tucson

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR ENTRY OF JUDGMENT.

This action having been tried upon the facts before the Court, sitting without a jury, the Court does hereby find the facts and states separately its conclusions of law thereon, and directs entry of judgment, as follows:

FINDINGS OF FACT.

1. Use-plaintiff, Mosher Steel Company (hereinafter "Mosher", is and was at all times material herein a corporation and a citizen of Texas. Defendant Fluor Corporation, Ltd., (hereinafter "Fluor"), is and was at all times material herein a corporation and a citizen of California. Defendants Federal Insurance Company, Vigilant

Insurance Company, Insurance Company of North America, General Insurance Company of America, Seaboard Surety Company, America Re-Insurance Company, Employees' Re-Insurance Group, and General Re-Insurance Group (hereinafter "Sureties"), are and were at all times material herein respectively corporations and citizens of states other than Texas or Arizona. Defendant Union Tank Car Company (hereinafter "Union"), is and was at all times material herein a corporation and a citizen of New Jersey, having a principal place of business in Illinois. Graver Tank and Mfg. Company (hereinafter "Graver"), is and was at all times material herein a division of Union and not a separate entity. Defendant Ward Industries Corporation (hereinafter "Ward"), is and was at all times material herein a corporation and a citizen of Delaware, having a principal place of business in New York, and is sued herein by Mosher as a member of a Joint Venture composed of Ward and Idaho-Maryland Industries, Inc., (hereinafter "IMI"). None of the defendants at any time material herein had a principal place of business in either Texas or Arizona.

2. All acts, conduct, and documents of Graver, or relating to Graver, mentioned or described in these Findings are the acts, conduct, and documents of Union and relate to Union. The terms "Graver" and "Union" are interchangeable and both refer to and mean defendant "Union". (Statement of Uncontested Facts, ¶ 3.)

3. The matter in controversy between Mosher and defendants exceeds $10,000, exclusive of interest and costs; and Mosher's claim against defendants Fluor and Sureties, asserted in Count I of Mosher's Amended Complaint, is asserted under the Miller Act. (40 U. S. C. §§ 270a, et seq.)

4. The United States of America entered into a written contract dated May 29, 1961, with Fluor, whereby Fluor agreed to perform work and to furnish services, labor,

equipment, and materials for the construction of certain missile launch facilities near Davis-Monthan Air Force Base, Tucson, Arizona. (Jt. Ex. 1 in evidence.)

5. In connection with the Davis-Monthan job (the contract described in Finding No. 4), defendants Fluor and Sureties executed a payment bond. (Jt. Ex. 49 in evidence.)

6. The United States of America entered into a written contract dated May 29, 1961, with Matich Bros. and M. M. Sundt Construction Corp., whereby Matich and Sundt agreed to perform work and to furnish services, labor, equipment and materials for the construction of certain missile launch facilities near Vandenberg Air Force Base, Lompoc, California. (Statement of Uncontested Facts, ¶ 10.)

7. On September 8, 1961, Fluor entered into a written subcontract with Union, acting by and through Graver, whereunder Union agreed to perform certain of the work and to supply certain of the labor, materials, and other items provided in Fluor's prime contract described in Finding No. 4 to be performed and supplied by Fluor upon the Tucson project. (Jt. Ex. 2 in evidence.)

8. On September 8, 1961, Matich Bros. and Sundt entered into a written subcontract with Union, acting by and through Graver, whereunder Union agreed to perform certain of the work and to supply certain of the labor, materials, and other items provided in Matich Bros. and Sundt's prime contract described in Finding No. 6 to be performed and supplied by Matich Bros. and Sundt upon the Vandenberg AFB project. (Jt. Ex. 4 in evidence.)

9. On or about July 14, 1961, a document (Union Ex. 4 in evidence) captioned "Letter of Intent Preparatory to Formal Agreement" was executed by and between IMI and Ward, wherein Ward and IMI expressed their intention as more particularly specified in the document, to execute a joint venture agreement for the performance of

work on a proposed subcontract to IMI under a letter of intent from Union. (Statement of Uncontested Facts, ¶ 13.)

10. On July 28, 1961, IMI and Ward executed a document (Union Ex. B in evidence), captioned "Joint Venture Agreement". (Statement of Uncontested Facts, ¶ 14.)

11. Thereafter, and prior to October 23, 1961, with Union's approval, IMI and Ward executed and entered into, as of July 28, 1961, a revised Joint Venture Agreement (Jt. Ex. 7 in evidence), creating the joint venture to be known as, and hereinafter referred to as "IMI-Ward".

12. On October 23, 1961, defendant Union, acting through Graver, entered into a written subcontract with IMI-Ward (Jt. Ex. 8 in evidence), under the terms of which IMI-Ward undertook and agreed to perform certain of the work and supply certain of the materials and other items provided in Union's subcontracts described in Findings Nos. 7 and 8, above, to be performed and supplied by Union upon the Tucson project and the Vandenberg AFB project. (Jt. Exs. 2 and 4 in evidence.) The subcontract price provided in Jt. Ex. 8 in evidence to be paid to IMI-Ward is the sum of $8,525,011.00, of which sum $7,971,293.00 is applicable to work of IMI-Ward at the Tucson job and the balance of $553,718.00 is applicable to the work at the Vandenberg AFB project.

13. Mosher brings this action against defendants Union, Ward, Fluor, and Sureties for $298,336.58, which it claims is owing to it for fabricating certain steel, for furnishing certain steel, and for freight charges relating to the delivery of steel, which steel was used and incorporated into the work at the Tucson project covered by Fluor's contract (Finding No. 4, Jt. Ex. 1 in evidence), Union's subcontract (Finding No. 7, Jt. Ex. 2 in evidence), and IMI-Ward's subcontract (Finding No. 12, Jt. Ex. 8 in evidence);

and Mosher seeks in this action, also, to recover from defendants Union and Ward the sum of $22,716.96, which it claims is owing to it for fabricating and furnishing steel and for freight charges in connection with delivering steel, which steel was used in and incorporated into the work at the Vandenberg AFB project covered by Matich Bros. and Sundt's contract (Finding No. 6), Union's subcontract (Finding No. 8, Jt. Ex. 4 in evidence), and IMI-Ward's subcontract. (Finding No. 12, Jt. Ex. 8 in evidence.)

14. The revised Joint Venture Agreement (Jt. Ex. 7 in evidence) entered into between IMI and Ward expressly provides, *inter alia,* that the obligations of the joint venturers under the subcontract with Union (Jt. Ex. 8 in evidence) shall be joint and several; that all money, equipment, materials, supplies and other property of any nature whatsoever required for or in connection with the performance of the IMI-Ward subcontract shall be held for the account of the joint venture; that their interests in any profits and their respective shares in any losses and liabilities that may result from the prosecution and completion of the work to be performed under and in connection with the subcontract with Union (Jt. Ex. 8 in evidence), and their interests in all property and equipment required by the Joint Venture in connection with such subcontract, shall be 50% each; that a Joint Venture Committee is established which shall have control of the Joint Venture and shall manage its affairs, determining all matters and questions in connection with IMI-Ward's performance of the subcontract with Union; that, subject to the control of the Joint Venture Committee, performance of the work required to be done under the sub-contract with Union shall be under the supervision of George J. Morton, Manager, whose authority to commit or bind IMI-Ward shall be limited to commitments related to the normal performance of the subcontract with Union; that IMI shall

directly manage and be responsible to the Joint Venture for the production and installation of the work to be performed under the subcontract with Union, except that the Joint Venture Committee may assign the performance of other minor portions of the work to Ward, it being the intention of the parties that the work shall primarily be performed by IMI in facilities owned or operated by it; and that work and services performed by either IMI or Ward shall be done on the basis of the assumption and reimbursement by the Joint Venture of the actual cost of such work, including overhead and general administrative expenses, but without profit.

15. At all times material herein, Denver Steel and Iron Works (hereinafter "D. S. I.") was a division of IMI (Ward Exs. A-1 through A-4 in evidence).

16. In June 1961, at a meeting held in Union's offices in Chicago, Sam Wilson, General Manager of D. S. I., was instructed by officers of Graver, including its president and Vice-President, as to a procedure which would be utilized in procuring raw steel on behalf of Graver for use in performing Graver's subcontract on the Tucson and Vandenberg AFB projects, under which procedure Wilson would negotiate for the steel with steel companies and advise the companies, when agreement as to price and delivery had been reached, that Graver's purchase order for the steel would be forthcoming. (RT 222, 231.)

17. Pursuant to such procedures, Sam Wilson arranged for the purchase of raw steel to be fabricated under the IMI-Ward subcontract with Union. In the negotiations with the steel mills, Wilson always negotiated on the basis, and so advised the mills, that Graver would issue the purchase order for the steel. (RT 181, 222, 231.)

18. Prior to October 13, 1961, George Morton, Manager of IMI-Ward, was told by officers and employees of Graver

that IMI-Ward was not on schedule and that Morton would have to expedite the subcontract work. (Morton Dep., Plt's. Ex. 39 for identification, pp. 11-13.)

19. The raw steel which was originally intended to be fabricated by IMI-Ward at D. S. I. was owned by Graver. (RT 181; Jt. Ex. 8 in evidence, ¶ 5, p. 4.)

20. Lionel Lancaster, Graver's Vice-President, on October 10 or 11, 1961, at Denver, instructed Sam Wilson of D. S. I., who was having problems completing steel fabrication in time to meet delivery requirements under IMI-Ward's subcontract with Graver, to farm out the fabrication of the raw steel to others in order to meet delivery (RT 185-6); and he further advised Wilson that if he should negotiate a satisfactory contract with Mosher for the fabrication, a Graver purchase order to Mosher would be forthcoming. (RT 188, 234). At this time, Wilson told Lancaster and Thomas D. Harle, Graver's Director of Purchases, that he didn't believe Mosher would accept an IMI purchase order and that he, Wilson, desired to give Mosher a Graver purchase order. Lancaster advised Wilson that a Graver purchase order would be forthcoming. (RT 187-188, 233.) Harle and Lancaster approved of Wilson's selection of Mosher as a fabricator. (RT 233.)

21. Wilson went to Texas and on October 13, 1961, on behalf of Graver, negotiated with Mosher the complete terms, prices, and conditions of a contract for Mosher to fabricate steel required for the Tucson project (RT 193-4), advising Mosher that a Graver purchase order would be issued to cover the work. (RT 74, 187). The matters agreed upon by Wilson and Mosher were reduced to writing by Mosher on October 16, 1961. The writing was signed by Mosher's Senior Contracting Engineer and transmitted to Wilson at Denver, who signed it on behalf of Graver on October 20, 1961. Thereafter, Wilson mailed the executed writing to Mosher, who received it on October 26, 1961

(Plt's. Ex. 1 in evidence; RT 194). Wilson sent copies of Plt's. Ex. 1 to IMI at Los Angeles and Tucson, and to Graver at Tucson; and Wilson handed a copy of Plt's. Ex. 1 to Harle at Denver. (RT 194). Upon Wilson's return to Denver and before he received the October 16 letter (Plt's. Ex. 1 in evidence), Wilson told Harle of the agreement he had reached with Mosher's Burton and Mitchell at Dallas. (RT 235.)

22. On October 13, 1961, Wilson knew the credit reputation of IMI and felt the same would not be satisfactory to Mosher. (RT 191.) Mosher would not have accepted a purchase order on the credit of IMI because of its impaired credit rating known to Mosher from credit reports in its possession. (RT 438; Jt. Exs. 52 through 58 in evidence.)

23. On October 13, 1961, Mosher, through its Treasurer, Russell Moore, accepted the order placed by Wilson on that date to fabricate steel for Graver, and Mosher's shop order 66109 was marked open on October 17, 1961, showing Graver as the customer. (RT 351; Jt. Ex. 12 in evidence.)

24. Mosher, considering itself bound, began performance under the October 13, 1961, oral agreement and expended labor for engineering between October 18 and October 24, 1961. (RT 251.) Mosher's shop started making templates on October 23, 1961. Steel began to arrive in Houston from Graver on October 23, 1961, in railroad cars sent, freight collect, by Graver. (RT 285, 286.) Up to November 16, 1961, Mosher had incurred in excess of $40,000 in costs for shop work, overhead and costs of fabricating Graver steel, including inbound freight. (RT 287.)

25. Harle, Graver's Director of Purchases and Expeditor for the Tucson job, telephoned Ralph Burton, Mosher's Vice-President on October 19, 1961, and arranged to meet with Burton at Denver on October 23, 1961. (RT 253.) At that meeting, the parties discussed the October 16 letter

(Plt's. Ex. 1 in evidence) in detail, Harle advising Burton that Graver would issue its purchase order to Mosher within two to three weeks and that the October 16 letter would serve as an interim purchase order until a formal purchase order could be sent by Graver. Harle also advised Burton that Wilson had signed Plt's Ex. 1 in evidence and had returned it to Mosher at Dallas. (RT 253-258.) As Director of Purchases, Harle possessed and exercised authority to issue purchase orders for Graver. (RT 905.)

26. On October 19, 1961, Mosher received from Harle a written procedure of Union's regarding shipments of steel to Mosher. This document referred to Mosher's order No. 66109, the same number carried on the October 16 letter. (Jt. Ex. 60; Plt's. Ex. 1 in evidence.)

27. Prior to October 23, 1961, Harle had directed that raw steel be forwarded from D. S. I. to Mosher at Houston and that other steel be sent from the steel mills to Mosher at Houston. (RT 254, 285-286; Jt. Ex. 60 in evidence.) This steel was owned by Graver and was stenciled "Property of Graver Tank & Mfg." (RT 181, 905.)

28. Although prior to October 31, 1961, Union's Vice-President Lancaster, Director of Purchases Harle, and Senior Contract Engineer Branting knew that Wilson had undertaken to contract on behalf of Graver for Mosher to fabricate steel for the Tucson job and knew of the contents of Plt's. Ex. 1 in evidence (RT 253-258; Jt. Ex. 60 in evidence; Union Ex. G in evidence), no officer or employee on behalf of Union ever questioned with either Wilson or Mosher, Wilson's conduct in acting on behalf of Graver. (RT 199-200.) However, the Graver purchase order which Wilson had assured Mosher would be forthcoming (Finding No. 21) and which Harle had informed Mosher would be issued to it (Finding No. 25), never was issued or delivered to Mosher.

29. On October 31, 1961, Wallace Orr, Director of Contracts for IMI-Ward, and W. E. Holmes, Manager of Construction for IMI-Ward, by direction of George Morton, IMI-Ward Manager, came to Texas for the purpose of negotiating a contract between IMI-Ward and Mosher for the fabrication of steel to be used in the Tucson and Vandenberg AFB jobs. (RT 791.) During negotiations with Burton and Mitchell of Mosher, Holmes and Orr talked of ordering steel fabricated for the Vandenberg AFB job and asked if Mosher would change the Customer on the steel job which Wilson had negotiated in Graver's name (Plt's. Ex. 1 in evidence) from Graver to IMI-Ward, explaining that it would make matters much easier and simpler for them from an accounting standpoint if Mosher accepted the change and accepted an IMI-Ward purchase order. (RT 261-265.) Holmes and Orr stated that if the change could be made, IMI-Ward would be the customer and they furnished IMI-Ward's address. (RT 88.) Holmes and Orr were told by Mitchell and Burton that only Russell Moore, Treasurer of Mosher, at Houston, could give approval for the requested change. Burton reached Moore by telephone and Moore stated that IMI-Ward would be accepted as purchaser provided Graver would be responsible for payment, which statement Burton passed on to Holmes and Orr. (RT 90, 264-265, 354.) Holmes and Orr stated they would look further into the matter and let Mosher know. (RT 90.)

30 Following his return to California from Texas, Orr caused the purchase orders which are Jt. Exs. 9 and 10 in evidence to be prepared by Frank J. Wright, purchasing man for IMI-Ward, and sent to Mosher. (RT 796-798, 863.) The purchase orders were received by Mosher in Dallas on November 10, 1961. At the time Wright prepared and signed the purchase orders, there were in existence no IMI-Ward purchase order forms and Wright utilized IMI

purchase order forms intending to obligate IMI-Ward. (RT 825-826, 798.) Mosher did not enter any change in its shop order for the Tucson job nor did it enter any shop order for the Vandenberg job until November 16, 1961. (RT 90-93.) Mitchell, Mosher's Senior Contracting Engineer, held the purchase orders (Jt. Exs. 9 and 10 in evidence) on his desk in Dallas until November 16, 1961, when he transmitted them to Mosher's main office in Houston, where they were received on November 17, 1961.

31. On November 7, 1961, Harle, Graver's Director of Purchases, was in the Mosher offices in Houston and was told by Moore, Mosher's Treasurer, that he would not release shipments of the steel which Mosher was fabricating until Mosher received confirmation that Graver would be responsible for payment for the material. (RT 354-355.) Harle suggested to Moore that he should get in touch with the person who could give assurance of payment, John Page, Graver's Controller, in Chicago, and Harle reached Page by telephone and informed him of Mosher's requirement in order to release the steel shipments. Moore also talked to Page and told him that the steel would be shipped to the missile sites only upon an agreement that if Mosher was not paid within the terms of the sale, then Graver would have to be responsible for paying Mosher. (RT 355.) Page advised Moore that approval for carrying out Moore's request would have to be sought from Morton, Manager of IMI-Ward, and Page told Moore that he would get in touch with Morton and advise Moore of the result. (RT 356.)

32. Prior to this time, Page had learned that Mosher was demanding a guarantee by Graver of the entire account and had talked with Vernon John of IMI-Ward about it, Page telling John that a guarantee would be considered only on the written request of John which must include an agreement that any payment by Graver to

Mosher could be withheld from IMI-Ward. (Union Ex. K in evidence.)

33. On November 13, 1961, Orr of IMI-Ward telephoned Moore and requested Moore to accept a purchase order solely on the credit of IMI-Ward. When Moore refused, Morton, IMI-Ward Manager, got on the phone and made the same request, which was also rejected by Moore. Moore advised Morton to contact Graver's Controller Page to get Page's approval for Graver's paying Mosher for its work, and Morton stated that if these were Mosher's conditions he would have to give his approval to Page. (RT 357-360.)

34. On November 13, 1961, Vernon John, for IMI-Ward, addressed a letter to Page, Graver's Controller, authorizing Graver to pay Mosher's invoices which would approximate $225,000, after acceptance of Mosher's work by IMI-Ward, and to deduct the amounts of such payments from the total IMI-Ward subcontract price for its work on the Tucson and/or Vandenberg AFB sites. (Jt. Ex. 26 in evidence.) Page had requested John to write him a letter of this nature. (RT 737-738.) John's letter was not received in Page's office until December 11, 1961, by which date Page had left his office permanently; but Harle, Graver's Director of Purchases, was shown a copy of the letter in IMI-Ward's California offices by Frank Wright of IMI-Ward on November 14, 1961. (RT 902.) On December 6, 1961, Harle wired Frank Wright that John's letter had not been received by Graver and asked that John mail immediately a duplicate of the letter, dated November 13, 1961. (Jt. Ex. 25 in evidence.)

35. On November 15, 1961, Moore telephoned Page in Chicago and Page informed him that a clearance had been obtained from Morton for Graver's paying Mosher directly and informed Moore that Graver would make payment to Mosher directly, with deduction being made from

the IMI-Ward contract. Page advised Moore, also, that he would write Moore a letter to this effect. (RT 360-362.)

36. On November 15, 1961, and prior to the telephone conversation between Moore and Page, Harle sent Page a TWX (Jt. Ex. 45 in evidence) and had also talked with Page by telephone, with the result that Page had informed him that Page would take care of the problem relative to the credit. (RT 913.) On the same day, Harle wrote a letter to Burton, of Mosher, stating that the letter from Page should be in Moore's hands on November 15 or November 16. In his letter to Burton, Harle gave specific instructions to Mosher regarding how the doing of the steel fabrication work and its delivery should be accomplished. (Jt. Ex. 50 in evidence.)

37. Prior to Page's conversation with Moore on November 15, 1961, Harle had informed Page that Mosher sought a guarantee of the whole account and that Page would have to resolve this problem. (RT 756-757.) When talking to Moore on November 15, 1961, Page knew that Mosher was requiring that Graver assure payment of the entire account. (RT 751-754.)

38. Following his telephone conversation with Moore on November 15, 1961, Page sent Mosher a telegram stating: "Please accept this wire as a guarantee of Idaho-Maryland payment to you on your November 16 shipment. Complete details will follow in letter early next week." (Jt. Ex. 22 in evidence.) When Page informed Moore on the telephone that he would write a letter (Finding No. 35), he intended Moore to understand that the letter was to relate to the entire fabrication job, not just the first shipment. (RT 746-748, 752.) By the letter mentioned in the second sentence of the November 15 telegram to Moore (Jt. Ex. 22), Page intended Moore to understand that the letter would be one concerning the entire acount. (RT 750.)

39. On November 16, 1961, by authorization of Moore, Mosher's Treasurer, Mitchell entered the supplements required to Mosher's shop order 66109 to change the customer's name on the order from Graver to IMI, with credit on the order marked "Open" and shipments to be made to Graver at Tucson. At the same time, Mitchell also entered shop order 66146 to IMI to cover the fabrication of the Vandenberg work. (RT 92-93; Jt. Exs. 13 and 79 in evidence.) By reason of Moore's telephone conversation with Page on November 15, 1961, and the telegram from Page of that date, Moore understood and had reason to understand that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10 in evidence. Moore authorized the supplement to shop order 66109 and the entry of shop order 66146 by reason of that understanding; and he permitted the release and shipment of the steel fabricated by Mosher pursuan to Jt. Exs. 9 and 10 upon that understanding. Had it not been for Page's statement to Moore on November 15 and Page's telegram of November 15, Mosher would not have accepted either IMI or IMI-Ward as its customer and it would not have proceeded with the work pursuant to Jt. Exs. 9 and 10 in evidence.

40. In agreeing to pay Mosher directly, Graver, through Page, acted primarily to protect and advance its own interests under its subcontracts with Fluor and Matich Bros. and Sundt (Jt. Exs. 2 and 4), because it had a definite stake in seeing to it that the fabricated steel came to the Tucson and Vandenberg sites.

41. After November 16, 1961, pursuant to the terms of Jt. Exs. 9 and 10 in evidence and to Graver's agreement to pay Mosher directly, Mosher fabricated the material described in Jt. Exs. 9 and 10 and delivered it to the Tucson and Vandenberg jobs. Graver supplied 1200 tons of the steel which Mosher fabricated for the Tucson job and 90 tons of the steel which Mosher fabricated for the

Vandenberg job. In addition, Mosher supplied from its own stock 165 tons of steel which it fabricated for the two jobs. In connection with the fabrication and delivery of this steel, Mosher expended $18,054.35 for inbound freight charges on steel shipped to it freight collect by Graver and $46,066.92 for outbound freight charges. (Jt. Exs. 9 and 10 in evidence; RT 287, 377-379, 905.) Computed in accordance with the prices and terms contained in Jt. Exs. 9 and 10 in evidence, Graver's charges and invoices for the steel fabricated and delivered to the Tucson job totalled $298,336.58 and for the steel fabricated and delivered at the Vandenberg site $22,716.96. (Jt. Ex. 14 in evidence.)

42. Pursuant to the purchase orders which are Jt. Exs. 9 and 10 in evidence, Mosher furnished items of work which were required to be furnished by IMI-Ward under its subcontract with Graver. (RT 555.) The prices provided in Plt's. Ex. 1 in evidence and Jt. Exs. 9 and 10 in evidence to be paid to Mosher for doing the steel fabrication were lower than the prices which IMI-Ward quoted to Graver in bidding for the subcontract with Graver. (RT 242-243.)

43. IMI had no subcontract from IMI-Ward to perform, in its own behalf, any of the work contemplated by the IMI-Ward subcontract with Mosher (RT 677; Union Ex. CCC-1 for identification, pp. 136-139; Jt. Ex. 7 in evidence); and the work IMI did on the Tucson and Vandenberg sites was performed solely pursuant to the Joint Venture Agreement. (Jt. Ex. 7 in evidence.) Mosher, in all its acts and dealings with regard to, or pursuant to, Jt. Exs. 9 and 10 in evidence understood and acted upon the belief that the purchaser or other contracting party was IMI-Ward.

44. In the first few days of December 1961, Page left his office with Graver in Chicago and never returned to it, his employment with Graver being terminated on December 12, 1961. (RT 740; Plt's. Ex. 36 for identification, p. 348.) However, when Page was terminated, other officials of

Graver, including Feurt, Manager of Construction Accounting, and Trytten, Acting Controller, knew of the existence of IMI-Ward's letter to Page authorizing Graver to pay Mosher's invoices (Jt. Ex. 26 in evidence), and knew that Page had informed Moore that Graver would make payment directly to Mosher and that Page would write Moore a letter to this effect. They knew, also, that Mosher was going ahead on the work described in Jt. Exs. 9 and 10 in evidence in reliance upon its understanding from Page's assurance on the telephone and his telegram that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10 in evidence. In fact, immediately after Page was terminated, these officials began the preparation of procedures for the direct payment to Mosher of its invoices and they drafted a letter such as Page had promised Moore he would write, to be sent to Mosher guaranteeing payment of all amounts which should become due to Mosher for steel furnished to IMI-Ward for the Tucson and Vandenberg jobs. (Plt's. Ex. 36 for identification, pp. 450, 451; Jt. Ex. 24 in evidence; Jt. Ex. 21 in evidence.) The letter (Jt. Ex. 21 in evidence) was never executed or sent to Mosher because Lancaster, Graver's Vice-President, pointed out that Mosher was proceeding with the steel shipments and suggested that the matter of a written guarantee be deferred until it was requested by Mosher and then be given on a "separate shipment basis." (Jt. Ex. 24 in evidence.)

45. After the execution of the subcontract between Union and IMI-Ward (Jt. Ex. 8 in evidence), IMI-Ward assigned all invoices arising out of the subcontract to the United California Bank at Los Angeles, California. Notice of such assignment was given to Union and a copy of the assignment was recorded in the office of the County Recorder of Los Angeles County, California (Union Exs. MM and KK in evidence); however, there is no evidence in the

record that Mosher was given or ever obtained from any source prior to the institution of this action, notice of the assignment.

46. In December 1961, Frank Wright, Purchaser for IMI-WARD, advised Moore, of Mosher, that Mosher's invoices theretofore issued to IMI-Ward were not billed by sites and levels. Mosher then rebilled and sent new invoices to IMI-Ward, completing this task on January 19, 1962. (RT 366-367.)

47. On February 2, 1962, IMI filed a voluntary petition under Chapter 11 of the Bankruptcy Act in the United States District Court, Southern District of California, Central Division, No. 137024-WB. On February 5, 1962, IMI, as the debtor in possession of its assets, filed an application to turn over possession of a certain manufacturing facility which it owned in Tucson, Arizona, to Graver under certain letter agreements dated February 1, 1962, and February 5, 1962. (Statement of Uncontested Facts, ¶ 17.)

48. The letter agreements of February 1 and February 5, 1962, were approved by the Referee in Bankruptcy on February 5, 1962, and IMI was authorized to accept Graver's offer in the letter agreement of November 5, 1962, and to turn over its Tucson facility to Graver. (Statement of Uncontested Facts, ¶ 18.)

49. Mosher's charges for work performed pursuant to Jt. Exs. 9 and 10 in evidence and delivered after February 2, 1962, are in the approximate sum of $55,000. (RT 384.)

50. Union caused to be prepared for presentation to the Referee in Bankruptcy in the IMI Chapter 11 proceedings, certain documents (Union Exs. ZZ, NNNN and PPPP in evidence) relating to Union's claim against IMI. The documents relate to the Tucson job and to the status, as of February 2, 1962, of the work subcontracted by Union to IMI-Ward. (RT 625-627.)

51. On March 20, 1962, Mosher sent to Fluor, by registered mail, the original of the letter and the statements and invoices which are part of Plt's. Ex. 24 in evidence.

52. In August, 1962, Mosher filed its proof of claim in the Chapter 11 proceedings of IMI, claiming that the debtor, IMI, was indebted to it for $22,716.96 for steel fabricated and delivered and furnished at Vandenberg and for $298,336.58 for steel fabricated, delivered and furnished at Tucson. The claim was filed as an unsecured claim, as qualified in paragraph 10 thereof, wherein Mosher alleged that Ward, as joint venturer with IMI, Union, and Fluor and its sureties were also liable to Mosher for the entire debt of $321,053.54, and that the filing of the claim was without prejudice to its rights against Ward, Union, and Fluor and its sureties. (Union Ex. E in evidence.)

53. On December 31, 1963, the Referee, pursuant to a plan of arrangement, ordered issued to Mosher in settlement of its claim against the debtor, IMI, certificates for 642,107 shares of IMI stock. (Union Ex. D in evidence.) Thereafter, IMI changed its name to Allied Equities Corporation and the stock was actually issued in a 1 to 20 "reverse split" (Jt. Ex. 39 in evidence), whereby Mosher received 32,105 shares of Allied Equities Corporation stock, the value of which has been established by stipulation of all parties to this action at $1.625 per share, or a total of $52,170.62. (RT 682.) The order for the issuance of such stock referred to a stipulation entered into between Mosher and the debtor, IMI, reiterating and reserving Mosher's claims against Ward, Union, and Fluor and its sureties, and referring to this action then pending in this Court. (Plt's. Ex. 26 in evidence.) Further, Mosher in the bankruptcy proceeding advised the Referee, and the Referee had notice, of Mosher's claims and position against Ward, Union, and Fluor and its sureties and of the pendency of this action by Mosher against Ward, Union and Fluor. (Plt's. Ex. 30 in evidence, p. 4, ¶ 8, Findings of Fact, etc.)

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of all parties to this action; and it has jurisdiction of the claims asserted herein by Mosher against defendants Fluor and Sureties by virtue of 40 U. S. C. § 270b, and of the claims asserted herein by Mosher against all defendants by virtue of 28 U. S. C. § 1332.

2. Mosher is not barred or estopped from recovering from defendants in this action by reason of its prosecution of its claim in the proceedings in the matter of the bankruptcy of IMI and its acceptance of the stock issued to it on its claim.

3. Mosher had a direct contractual relationship with Union and Mosher gave Fluor the written notice required by 40 U. S. C. § 270b.

4. IMI, in all its dealings with Mosher, was authorized to and did act for and on behalf of IMI-Ward. In furnishing, fabricating, and delivering the steel for the Tucson and Vandenberg jobs pursuant to the terms and provisions of Jt. Exs. 9 and 10 in evidence, Mosher did not deal with, nor rely upon the credit of, IMI, individually, but Mosher performed pursuant to its agreement with IMI-Ward. Ward, as a member of IMI-Ward, is obligated to Mosher by reason of Mosher's performance of the terms and provisions on Mosher's part contained in Jt. Exs. 9 and 10, in the amount of $298,336.58 for steel furnished, fabricated, and delivered to the Tucson job and in the further sum of $22,716.96 for the steel furnished, fabricated, and delivered to the Vandenberg site.

5. IMI is not an indispensable party to this action.

6. Page's telephone conversation with Moore on November 15, 1961, and his telegram to Moore of the same date, together with Mosher's resulting action on November 16, 1961, and subsequently, with relation to Jt. Exs. 9 and 10 in evidence, constituted a contract and had the

legal result of obligating Union to pay Mosher directly for all sums becoming due to Mosher under the terms and provisions of Jt. Exs. 9 and 10 for furnishing, fabricating, and delivering steel to the Tucson and Vanderberg jobs. Pursuant to the terms and provisions of Jt. Exs. 9 and 10, there became due to Mosher for furnishing, fabricating, and delivering steel to the Tucson job the sum of $298,-336.58 and for furnishing, fabricating, and delivering steel to the Vandenberg job the sum of $22,716.96; and Union is liable to Mosher for these amounts.

7. The sending to Mosher of the letter mentioned in Page's telegram of November 15, 1961, was not intended by Page to be a condition precedent to Union's agreement or obligation to pay Mosher; but if it was, Union is estopped to raise the non-performance of the condition as a defense in view of the facts set out in Finding of Fact No. 44, supra.

8. In connection with Union's agreement to pay Mosher directly, Union and IMI-Ward agreed that Union might pay Mosher for its work, after acceptance of the work by IMI-Ward, and deduct Mosher's invoices from the contract price between Union and IMI-Ward. However, the existence of an indebtedness from Union to IMI-Ward against which Union might charge what it paid to Mosher was not a condition precedent to its obligation to pay Mosher.

9. Mosher fully carried out and performed each and all of its promises and agreements contained in Jt. Exs. 9 and 10 in evidence. IMI-Ward accepted Mosher's work performed under Jt. Exs. 9 and 10 and Mosher was entitled to IMI-Ward's approval for payment of Mosher's invoices for such work.

10. The assignment of invoices by IMI-Ward to United California Bank did not affect Mosher's rights against either Union or Ward.

11. No provision of the Statute of Frauds relied upon by Union herein constitutes a defense to the claims of Mosher in this action.

12. Fluor and Sureties are liable to Mosher under their payment bond executed and delivered in connection with the Davis-Monthan job in the sum of $298,336.58.

13. Defendants are entitled to credit in the amount of $52,170.62 upon their respective obligations to Mosher, that amount being the agreed value of the stock received by Mosher upon its claim in the IMI bankruptcy proceedings.

14. Mosher is entitled to judgment herein against Fluor and Sureties in the sum of $246,165.96, and against Ward and Union in the sum of $268,882.92.

15. Inasmuch as Mosher's claims against all parties are unliquidated until judgment is entered, no interest is recoverable prior to the entry of judgment herein.

ORDER FOR JUDGMENT.

The clerk is directed to forthwith enter judgment herein, as follows:

In favor of Mosher and against defendants Fluor and Sureties, and each of them, for the sum of $246,165.96, together with interest thereon at the rate of 6% per annum from date of judgment until paid.

In favor of Mosher and against defendant Ward and Union, and each of them, for the sum of $268,882.92, together with interest thereon at the rate of 6% per annum from date of judgment until paid.

In favor of Mosher and against all defendants, and each of them, for Mosher's costs of suit herein.

Dated: May 24, 1966.

JAMES A. WALSH,
United States District Judge.

UNITED STATES COURT OF APPEALS
For the Ninth Circuit.

FLUOR CORPORATION, LTD., et al., UNION TANK CAR COMPANY, WARD INDUSTRIES CORPORATION, *Appellants and Cross-Appellees,* *vs.* UNITED STATES OF AMERICA, ex rel. MOSHER STEEL COMPANY, *Appellees and Cross-Appellants.*	No. 21,307 No. 21,307 A No. 21,307 B No. 21,307 C

[January 6, 1969.]

Appeal from the United States District Court
for the District of Arizona.

Before: HAMLIN, BROWNING, and ELY, *Circuit Judges.*
BROWNING, *Circuit Judge:*

The district court rendered judgment in favor of Mosher Steel Company and against the various appellants for prices agreed to be paid for materials furnished and services rendered by Mosher in the fabrication of steel used in the construction of missile launch facilities in Arizona and California.[1] We affirm the trial court's judgment except as it denied prejudgment interest. As to this, we reverse and remand for further proceedings.

Appellants strongly attack many of the trial court's findings. We have, therefore, examined the record with

1. Prior litigation in this court arising out of these projects is reported in *Dragor Shipping Corp.* v. *Union Tank Car Co.*, 361 F. 2d 43 (1966); 371 F. 2d 722 (1967); 378 F. 2d 241 (1967).

care. We find substantial conflicts in the testimony and the documentary evidence, and even stronger differences in the construction that the parties urge should be placed on events leading to the litigation and the inferences that should be drawn from them.[2] We have not asked ourselves whether we would have resolved the conflicts and ambiguities as the trial judge did, or whether we would have drawn the same inferences. *United States* v. *Real Estate Boards,* 339 U. S. 485, 495-96 (1950). We have, however, satisfied ourselves that upon an examination of the entire evidence we are not "left with the definite and firm conviction that a mistake has been committed" in any of the trial court's findings. *United States* v. *U. S. Gypsum Co.,* 333 U. S. 364, 395 (1948); see *Commissioner* v. *Duberstein,* 363 U. S. 278, 291 (1960). We therefore accept the trial court's findings, and base the statements of fact in this opinion upon them.

Fluor Corporation, Ltd., was the prime contractor for the construction of the Arizona launch facilities, and the insurance company appellees were sureties on Fluor's performance bond. Matich Bros. and M. M. Sundt Construction Corp., who are not parties to this litigation, were the prime contractors for the California launch facilities.

Fluor and Matich & Sundt entered into separate first tier subcontracts with Union Tank & Mfg. Co.[3] Union, in turn, entered into second tier subcontracts for steel fabrication work with IMI-Ward, a joint venture created by Idaho-Maryland Industries Inc. and Ward Industries Corporation.

When IMI-Ward fell behind schedule in the performance

2. The parties are well aware of these conflicts and differences; they have explored them in great detail in their briefs. No useful purpose would be served by publishing them here.

3. Union acted principally through a division known as Graver Tank & Mfg. Co., and the trial court's findings refer to "Union" and "Graver" interchangeably.

of its subcontract, Union, on October 10 or 11, 1961 instructed an IMI-Ward official to "farm out" the steel fabricating work, and approved the selection of Mosher to perform it. Because the IMI-Ward official did not think Mosher would accept an IMI-Ward purchase order, Union agreed that if a satisfactory contract could be worked out with Mosher, Union would give Mosher a Union purchase order.

On October 13, the IMI-Ward official negotiated a detailed contract with Mosher for the required work. As anticipated, Mosher would not accept IMI-Ward's credit. The IMI-Ward official then advised Mosher that Union purchase order would be issued. On October 16, Mosher set out the agreed-upon terms in a letter addressed to the IMI-Ward official. That official signed the letter on behalf of Union and sent copies of the executed writing to Union. Mosher then began performance of the work.

Union told Mosher on October 23 that Union's purchase order would be issued within two or three weeks, and that the October 16 letter would serve as an interim purchase order until the formal purchase order could be mailed. Thereafter, on October 31, IMI-Ward asked Mosher, as a matter of accounting convenience for IMI-Ward, to change the designated customer on the job from Union to IMI-Ward, and to accept IMI-Ward purchase orders in place of those of Union. Mosher agreed, provided Union would be responsible for payment.

IMI-Ward sent Mosher two purchase orders on November 3 covering the work to be done. Mosher informed Union that completed material would not be shipped until Mosher received confirmation that Union would be responsible for payment.

On November 15, after securing IMI-Ward's approval, Union advised Mosher that Union would pay Mosher directly and deduct the payments from the amounts Union

was to pay IMI-Ward under the latter's subcontract.[4] Mosher understood, and Union intended Mosher to understand, that its commitment extended to all the work covered by IMI-Ward's purchase orders of November 3. Upon receiving Union's commitment, Mosher changed the customer's name from Union to IMI-Ward, completed the work, and delivered the fabricated steel to the job sites.

On February 2, 1962, IMI filed a voluntary petition under Chapter 11 of the Bankruptcy Act. Mosher submitted a proof of claim in these proceedings, and it was issued IMI stock under a plan of reorganization. Except for this stock, Mosher was not paid for its work.

The district court gave judgment against Union, finding that the commitment Union gave Mosher on November 15 and Mosher's completion and delivery of the work thereafter created a contract between Union and Mosher obligating Union to pay Mosher directly. Judgment was rendered against Fluor and its sureties under the Miller Act, 40 U. S. C. § 270.[5] The district court entered judgment against Ward on the ground that IMI-Ward's November 3 work orders and Mosher's fabrication and delivery of material pursuant to such orders created a contract between Mosher and IMI-Ward obligating Ward to pay Mosher in accordance with the terms and conditions of those orders.

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4. The commitment was given orally. Union told Mosher that it would be confirmed by a subsequent letter. Although the letter was prepared by Union, it was not sent because Mosher continued to make shipments without it. Union argues that the sending of this letter was intended to be condition precedent to the formation of a contract, and that the trial court's finding to the contrary is clearly erroneous. We think the finding is supported by evidence from which the trial court could conclude that the promised letter was intended to be a written confirmation of an agreement already reached. *Merritt-Chapman & Scott Corp.* v. *Gunderson Bros. Eng'r Corp.*, 305 F. 2d 659, 664-65 (9th Cir. 1962), upon which Union relies, is inapplicable for this reason.

5. Since Fluor was not involved in the California project, the judgment against Fluor and its sureties was limited to the amount due for materials used in the construction of the Arizona facilities.

Union contends that Mosher performed the work for IMI-Ward; that Union's agreement, if any, was only a guarantee to pay Mosher if IMI-Ward did not; and, being oral, this agreement to answer for the debt of another was unenforceable under the Statute of frauds.

Ward, on the other hand, contends that the only viable contract was an oral agreement between Mosher and Union arising on October 13, binding Mosher to perform the work and Union to pay for it. If there was a November agreement between Mosher and IMI-Ward, Ward argues, it required nothing of Mosher which Mosher was not already obligated to do under its October agreement with Union, and, therefore, any promise by IMI-Ward was not supported by consideration. Furthermore, the only consideration for which Mosher bargained was Union's unconditional promise to pay Mosher directly. Consequently, any promise by IMI-Ward was not bargained for and hence was unenforceable under our decision in *Colorado Nat'l Bank of Denver* v. *Boehm,* 286 F. 2d 494 (1961).

As we read the district court's findings, the court determined that *both* Union and IMI-Ward assumed direct obligations to pay Mosher for the work. IMI-Ward contracted directly with Mosher to have Mosher perform the work described in the November 3 work orders in return for payment by IMI-Ward of the prices fixed in those orders. This agreement was subject, however, to the condition precedent that Union also agree to be directly liable for payment. When Union agreed to pay Mosher, it became directly bound to Mosher. Union's promise also satisfied the condition precedent to the direct contractual obligations between IMI-Ward and Mosher.[6]

6. Ward argues that no agreement arose because Mosher rejected an element of IMI-Ward's initial offer, namely, that IMI-Ward's credit be substituted for that of Union. There was substantial evidence supporting the trial court's findings that IMI-Ward agreed to Mosher's counter-offer to accept IMI-Ward work orders and to substitute IMI-Ward for Union as the account customer if Union would agree to pay for the work.

In view of Union's obligations under its subcontract with Fluor and Matich & Sundt, Union had a substantial interest in assuring performance of the work by Mosher. As the district court found, "in agreeing to pay Mosher directly, [Union] . . . acted primarily to protect and advance its own interests under its subcontracts. . . ." Since Union's promise to pay was a direct and original undertaking rather than a collateral promise to pay IMI-Ward's debt, it was not within the Statute of Frauds, even though IMI-Ward was also obligated to pay for the work. *Holmes* v. *Suffrin,* 198 Ill. App. 45 (1916); *Peters* v. *Raven,* 159 Ill. App. 122 (1910); *Leisman & Co.* v. *Otto,* 64 Ky. (1 Bush) 225 (1866); *cf. Granite City Lime & Cement Co.* v. *Board of Educ. of School Dist. 126,* 203 Ill. App. 134 (1916). See 4 Corbin on Contracts § 926, p. 705.[7]

As to Ward's argument that any promise made by Ward to Mosher in November was without consideration, because of Mosher's pre-existing contractual obligation to perform the same work for Union, it should be noted that the district court did not conclude that a Union-Mosher contract arose in October. Even if such a prior Union-Mosher contract existed, IMI-Ward's subsequent promise would still have consideration. Under the arrangement finally agreed to, Mosher, at IMI-Ward's solicitation, undertook the additional obligation to designate IMI-Ward, rather than Union, as the customer, and to accept the IMI-Ward pur-

7. Union also contends that its commitment was limited to materials produced for use in constructing the Arizona launch facilities. Although the testimony of one witness might be read as supporting the limitation for which Union argues, as Mosher points out, there was other evidence supporting the trial court's finding that Union's commitment covered payment for all of the work Mosher was to do—whether used in construction of the Arizona facilities or those in California.

chase orders. These new undertakings were sufficient to support IMI-Ward's promise to pay.[8]

Ward's reliance upon *Colorado Nat'l Bank of Denver* v. *Boehm, supra,* 286 F. 2d 494, is also misplaced. Mosher's insistence upon a direct commitment from Union, does not mean that this was the only consideration for which Mosher bargained. Mosher also sought and obtained a promise of payment from IMI-Ward. The fact that IMI-Ward's promise alone was not enough to satisfy Mosher, or that Union's promise alone might have been sufficient, is irrelevant. *See Granite City Lime & Cement Co.* v. *Board of Educ. of School Dist. 126, supra,* 203 Ill. App. 134; *Peters* v. *Raven, supra,* 159 Ill. App. 122; Restatement of Contracts §§ 111, 113.

Ward contends that Ward is not liable even if IMI is, because the extension of credit or the delivery of goods to one member of a joint venture does not obligate the joint venture. The cases upon which Ward relies involve the assumption of liability by a joint venturer beyond the scope of his authority to act for the joint venture.[9] Here, however, the district court concluded on the basis of findings supported by substantial evidence that IMI's acts were authorized by and performed on behalf of the IMI-Ward joint venture.

Both Union and Ward argue that because Mosher filed a claim in the IMI bankruptcy proceedings representing that the amount due Mosher was an unsecured independent obligation of IMI, and because Mosher accepted a distribu-

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8. The basis for IMI-Ward's interest in these arrangements is suggested by the district court's finding that the prices which IMI-Ward had agreed to pay Mosher for the work were lower than those which IMI-Ward would collect from Union for the work.

9. *See,* for example, *Wreen* v. *Moskin,* 226 App. Div. 563, 235 N. Y. S. 405 (1929); *American Mut. Life Ins. Co.* v. *Hanna, Zabriskie & Daron,* 297 Mich. 599, 298 N. W. 296, 299 (1941); and *Matanuska Valley Bank* v. *Arnold,* 223 F. 2d 778 (9th Cir. 1955).

tion of the stock of the reorganized debtor on the basis of this claim, it is estopped from asserting that Union and Ward are liable. The result urged by Union and Ward can obtain only if it is required by some legal fiction for Mosher in its proof of claim against IMI explicitly reserved its rights against Ward, Union, Fluor, and the sureties.[10]

Thus, unlike claimant in *Eads Hide & Wool Co.* v. *Merrill*, 252 F. 2d 80 (10th Cir. 1958), which is relied on by Ward and Union, Mosher did not in the bankruptcy proceedings elect the remedy of recovery against only one of the allegedly liable parties. Moreover, Mosher did not assume different positions as to the facts in that proceeding and in this. It is not for us to say whether the decision allowing Mosher's claim in the bankruptcy proceeding was correct. We do hold that Mosher's full disclosure and express retention of rights in that proceeding precluded an estoppel against Mosher in this litigation.[11]

In addition to defending against Mosher's claim, Union filed a counterclaim alleging that if it were liable at all it would be as a surety only, and praying that Mosher be required to seek satisfaction first from Ward. In its findings and conclusions the trial court did not refer expressly to Union's counterclaim. When the omission was called to the court's attention, the court entered a judgment that

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10. Mosher's claim in the bankruptcy proceeding stated: "Claimant corporation claims that Ward Industries Corporation, as joint venturer with the Debtor, and Union Tank Car Company through its division, Graver Tank & Mfg. Co., are also liable to claimant corporation for the entire said debt, . . . Claimant corporation's filing of the claim in this proceeding is made without prejudice to its rights against the said Ward Industries Corporation, and the said Union Tank Car Company . . . In addition . . . claimant corporation has claimed that Fluor Corporation Ltd. and its sureties are liable. . . ."

11. Mosher will not obtain double recovery. In computing the amount of the judgment, the trial court deducted the stipulated value of the stock received by Mosher in the bankruptcy proceeding.

Union "take nothing by its counterclaim." Union contends that the existence of a principal-surety relationship not only was admitted in Mosher's answer to Union's counterclaim but was established by the evidence, and that, in any event, the district court erred in disposing of the counterclaim without entering findings of fact and conclusions of law as required by Fed. R. Civ. Proc. 52(a).

The purpose of Rule 52(a) is satisfied if the trial court's findings are sufficient to afford a clear understanding of the ground upon which the court based its judgment. *Seligson* v. *Roth*, ... F. 2d ..... (9th Cir. 1968). It is apparent to us that the trial court rejected Union's counterclaim because it found Union's relationship to the debt to be that of a direct obligor, not a surety. Contrary to Union's contention, Mosher did not admit in its pleadings that Union was merely a guarantor;[12] and, as we have said, the trial court's finding that Union agreed to a direct and primary obligation is not clearly erroneous.

On the basis of this finding we also reject the contention advanced by Fluor and its sureties that Mosher was not a "person having a direct contractual relationship with a subcontractor" of Fluor within the meaning of 40 U. S. C. § 270(b). We are not convinced that recognition of Mosher's claim will extend the coverage of the Miller Act beyond that intended by Congress, nor that the result will be to "impose liability on the payment bond in situations where it is difficult or impossible for the prime contractor to protect himself." *MacEvoy* v. *United States*, 322 U. S. 102, 110 (1944). Fluor could easily have protected itself by requir-

12. In its answer to Union's counterclaim, Mosher admitted that it had alleged in the complaint that Union was a surety, but Mosher also stated "the amended Complaint includes other counts and allegations as therein set forth." These "other counts and allegations" of Mosher's complaint asserted that Union was directly liable to Mosher for the debt. "A party may . . . state as many separate claims . . . as he has regardless of consistency . . . ." Fed. R. Civ. Proc. 8(e)(2).

ing appropriate security from Union. *See Hill* v. *American Surety Co.*, 200 U. S. 197, 204-05 (1906); *Mankin* v. *Ludowici-Celandon Co.*, 215 U. S. 533, 540 (1910).

We turn to Mosher's cross-appeal from the portion of the judgment which denied prejudgment interest on the amount found to be due under the contracts.

There is some disagreement among the parties as to whether the governing law is that of the state of the forum (Arizona) or of the states in which the contracts were to be performed (Arizona and California). Since there is nothing to indicate that the relevant law of the two states differs, we have not concerned ourselves with the problem. The California rule is stated in section 3287, California Civil Code, "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . . " Arizona follows the same general rule.[13]

Cross-appellees argue that Mosher's damages were not "certain or capable of being made certain by calculation" prior to judgment because of the disputed value of the IMI stock which Mosher received in partial payment of its

13. The California statute was enacted in 1872, and states the common-law rule. Restatement, Contracts § 337(a). Arizona has not codified the rule, but it is followed by the courts of that state. *United States Fidelity & Guar. Co.* v. *California-Arizona Const. Co.*, 21 Ariz. 172, 186 Pac. 502, 509 (1920); *Palmcraft Dev. Co.* v. *Phoenix*, 46 Ariz. 400, 51 P. 2d 921 (1935); *Schwartz* v. *Schwerin*, 85 Ariz. 242, 250, 336 P. 2d 144, 149 (1959); *Feighner* v. *Clarke*, 2 Ariz. App. 286, 408 P. 2d 219, 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P. 2d 513 (1966) (in banc); *Betz* v. *Goff*, 5 Ariz. App. 404, 406, 427 P. 2d 538, 540 (1967).

A recent addition to the California statute provides that where an unliquidated contract claim is involved interest may be awarded, in the court's discretion, for some or all of the period between the filing of suit and entry of judgment. Calif. Stats. 1967, ch. 1230, § 1.

claim in the IMI bankruptcy proceedings. The dispute over the stock's value was not resolved until the parties stipulated to its worth during the course of trial.[14]

Clearly, this circumstance did not render the amount of Mosher's claim uncertain until it arose. At a minimum, therefore, Mosher was entitled to prejudgment interest on the whole amount owing under the contracts from the date it became due (thirty days after February 28, 1962) to the date Mosher received the stock in partial payment.

It is equally apparent that Mosher was not entitled to interest after the latter date upon the portion of his claim which had been paid. But uncertainty about the precise value of the partial payment should not bar Mosher from compensation for the continued loss of the use of the much larger balance remaining unpaid. Interest on the difference between the amount due Mosher under the contracts and the value of the stock as determined at trial should be allowed from the date the stock was received to the date of judgment. Although we have found no decisions directly on point, this result is supported by analogous authorities.

Thus, even though the existence of an unliquidated counterclaim or set-off necessarily puts the amount payable in doubt, it is well settled that it does not render the claim itself uncertain or deprive the claimant of the right to

14. Cross-appellees also intimate that Mosher should be denied pre-judgment interest because the issue of liability was disputed. The generally accepted rule is that uncertainty as to liability, as distinguished from uncertainty as to the amount of the damage, does not bar recovery of prejudgment interest. Restatement, Contracts § 337(a), comment d. Despite disputed liability, prejudgment interest was awarded in both *Feighner* v. *Clarke*, 2 Ariz. App. 286, 408 P. 2d 219, 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P. 2d 513 (1966) (in banc); and *Betz* v. *Goff*, 5 Ariz. App. 404, 406, 427 P. 2d 538, 540 (1967). California cases to the same effect are collected in 5 U. C. L. A. L. Rev. 262, 266 n. 28 (1958).

prejudgment interest.[15] If the unliquidated set-off or counterclaim is based upon a breach unrelated to the sum due under the primary claim, interest is allowed on the entire claim. The amount of the counterclaim or set-off as determined at trial is then deducted from this total. If, as in the present case, the unliquidated set-off or counterclaim constitutes a partial payment of the primary claim, interest is allowable on the balance due after deducting the amount of the set-off or counterclaim as determined at trial.[16]

The result we reach is also supported by the principle recently applied in *Coleman Eng'r Co.* v. *North American Aviation,* 55 Cal. Rep. 1, 420 P. 2d 713 (1967). There, defendant argued that prejudgment interest was barred because a lesser amount of damages was awarded than plaintiff had originally demanded. The reduced claim resulted from the plaintiff's successful efforts in obtaining settlements with third persons and in salvaging materials. The Supreme Court of California held that under these circumstances uncertainty as to the amount due did not bar an award of prejudgment interest. It stated, "we are satisfied

15. *Hansen* v. *Covell,* 218 Cal. 622, 631-32, 24 P. 2d 772, 775, 89 A. L. R. 670 (1933) (in banc); *McCowen* v. *Pew,* 18 Cal. App. 482, 483 *et seq.,* 123 Pac. 354, 355-56; *Hunt Foods* v. *Phillips,* 248 F. 2d 23, 26-27 (9th Cir. 1957) (Calif.). Other California decisions are collected in 14 Cal. Jur. 2d 79, 705-06, and 5 U. C. L. A. L. Rev. 262, 268, n. 37 (1958). *See also Mall Tool Co.* v. *Far West Equip. Co.,* 45 Wash. 158, 273 P. 2d 652, 663 (1954); *Sam Macri & Sons, Inc.* v. *United States,* 313 F. 2d 119, 129-30 (9th Cir. 1963); *American Sur. Co.* v. *United States,* 368 F. 2d 475, 479-80 (9th Cir. 1966); 5 Corbin, Contract § 1046, p. 286, § 1051, pp. 305-06.

"In short," Professor McCormick states, "it is the character of the claim and not of the defense that is determinative of the question whether an amount of money sued for is a 'liquidated sum.'" McCormick on Damages, § 54 p. 216 (1935).

16. *Hansen* v. *Covell,* 218 Cal. 622, 631-32, 24 P. 2d 772, 775-76 (1933) (in banc); *Hunt Foods* v. *Phillips,* 248 F. 2d 23, 26-27 (9th Cir. 1957) (Calif.); and cases collected at 14 Cal. Jur. 2d § 79, pp. 705-06.

that reductions in damages due to plaintiff's efforts to mitigate damages should not preclude an award of prejudgment interest. If the rule were otherwise, a plaintiff might be encouraged to forego opportunities to mitigate damages so as not to jeopardize his right to prejudgment interest." Similarly, Mosher's right to prejudgment interest should not be denied because Mosher in seeking and obtaining partial payment from a joint obligor reduced the amount of its claim against cross-appellees.

The judgments are affirmed on the appeals and reversed for further consideration on the cross-appeal.

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

U. S. Court of Appeals and Post Office Building

7th & Mission Streets, P. O. Box 547

San Francisco, California 94101

Jan 6 1969

Re: No. 21307, Fluor Corporation, Ltd., et al.
v. USA, ex rel. Mosher Steel Co.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered affirming and reversing on cross-appeal the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

WILLIAM B. LUCK,
Clerk of Court.

UNITED STATES COURT OF APPEALS
for the Ninth Circuit.

FLUOR CORPORATION, LTD., et al.,
UNION TANK CAR COMPANY, WARD INDUSTRIES CORPORATION,
Appellants and Cross-Appellees,
vs.
UNITED STATES OF AMERICA, ex rel. MOSHER STEEL COMPANY,
Appellees and Cross-Appellants.

Filed Feb. 11, 1969
Wm. B. Luck, Clerk

No. 21,307
No. 21,307 A
No. 21,307 B
No. 21,307 C

ORDER.

Before: HAMLIN, BROWNING, and ELY, *Circuit Judges.*

The petitions for rehearing are denied.

Judge Ely has become convinced that we may have been mistaken in overturning that portion of the district court's judgment which disallowed prejudgment interest and would therefore, on that issue, grant the cross-appellees' petitions for rehearing.

SUPREME COURT, U. S.

APR 21 1969

JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1968

THE FLUOR CORPORATION, LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION AND GENERAL REINSURANCE CORPORATION,	No. 1177
WARD INDUSTRIES CORPORATION,	No. 1178
UNION TANK CAR COMPANY,	No. 1179

Petitioners,

UNITED STATES OF AMERICA for the use and benefit of MOSHER STEEL COMPANY and MOSHER STEEL COMPANY,

Respondents.

RESPONSE TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the

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October Term, 1968

THE FLUOR CORPORATION, LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION AND GENERAL REINSURANCE CORPORATION,	No. 1177
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OPINION BELOW

The Opinion of the Court of Appeals (..... Fed (2) .....) is annexed as Appendix "A" infra, pages A1 to A14. The District Court made findings of fact and conclusions of law (R1220-1240) which are set forth as Appendix "B" infra, pages B1 to B25.

STATUTES INVOLVED

The three Petitions set forth statutes which the respective petitioners believe to be involved. In addition are the following sections of the Bankruptcy Act:

> Section 16. Co-Debtors of Bankrupts. The liability of a person who is a co-debtor with or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt." (U.S.C., Title 11, Chap. 3, Sec. 34)
>
> "Section 302. The provisions of Chapter I to VII, inclusive, of this act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter * * *" (U.S.C., Title 11, Chap. 11, Sec. 702).

STATEMENT OF THE CASE

The case turns upon resolving numerous disputed questions of fact, including the basic fact issue whether Mosher as a fabricator of materials bargained for and received only the promise of IMI (subsequently bankrupt) or, additionally, the obligation of Ward as a member of the IMI-Ward joint venture or, still additionally, the direct promise of Union, whose contract with Fluor, the prime contractor, covered the work in question. Ward and Union each claimed that not it, but the other, made a promise to Mosher, and Union claimed that if it made a promise it was only as a guarantor so that its liability would be secondary to Ward's.

After months of study of a voluminous record and briefs of hundreds of pages the trial court made specific findings favorable to Mosher on all the disputed fact

questions, including the finding that Mosher exacted and received the direct promise of both Ward and Union, as well as IMI, for payment of the materials.

With this finding the questions of law fell into place almost automatically because Union's defenses were largely based upon its claim of secondary liability only and the defense of Fluor and its Miller Act sureties was based on the claim that its first-tier subcontractor, Union, had incurred no direct obligation to Mosher.

The Court of Appeals made an independent examination of the record with this result, as stated at the outset of the Opinion.

> "Appellants strongly attack many of the trial court's findings. We have, therefore, examined the record with care. We find substantial conflicts in the testimony and the documentary evidence, and even stronger differences in the construction that the parties urge should be placed on events leading to the litigation and the inferences that should be drawn from them. We have not asked ourselves whether we would have resolved the conflicts and ambiguities as the trial judge did, or whether we would have drawn the same inferences. *United States v. Real Estate Boards*, 339 U.S. 485, 495-96 (1950). We have, however, satisfied ourselves that upon an examination of the entire evidence we are not 'left with the definite and firm conviction that a mistake has been committed' in any of the trial court's findings. *United States v. U. S. Gypsum Co.*, 333 U. S. 364, 395 (1948); see *Commissioner v. Duberstein*, 363 U. S. 278, 291 (1960). We therefore accept the trial court's findings, and base the statements of fact in this opinion upon them."

Thus the substantial points of difference between the parties have been put to rest by findings of the trial

court accepted by the Court of Appeals after an independent examination of the record.

Nevertheless, the Petitions here, like the briefs of petitioners in the Court of Appeals, persist in reciting bits and pieces of testimony in opposition to the findings of the trial court.

For example, pages 6 through 8 of Ward's Petition seek to establish by carefully selected statements that Mosher dealt with IMI rather than with the IMI-Ward joint venture, whereas from the evidence as a whole the trial court found that Mosher dealt with the IMI-Ward joint venture, and that the various representatives mentioned in Ward's Petition represented the IMI-Ward joint venture rather than IMI.

For further example, in pages 3 through 9 of Union's Petition, Union attempts to show, by isolated quotations from testimony, that it did not become obligated to Mosher, or that if it did, it was only a surety, whereas from the evidence as a whole the trial court found that Union *did* promise payment to Mosher, and as a *direct* obligation rather than as surety for Ward.

Similarly, Fluor's effort, in its Petition, to remove Mosher from the status of a supplier holding the direct obligation of a first tier sub-contractor under the Miller Act simply ignores the finding of the trial court, accepted by the Court of Appeals, that Union undertook a direct obligation to Mosher.

Thus the short answer to all three Petitions is that they amount to no more than a last-ditch effort to reopen fact disputes which have been settled by find-

ings of the trial court accepted by the Court of Appeals after an independent examination of the record.

THE WARD PETITION

Ward claims an equitable estoppel against Mosher on the theory that an inconsistency exists between Mosher's status as a creditor of IMI in the Chapter XI reorganization of IMI and its status as a creditor of the IMI-Ward joint venture.

Of course a claim of equitable estoppel comes with poor grace from one like Ward which has received full credit on Mosher's judgment against it for the stipulated value of the stock received by Mosher in the IMI reorganization and was itself a party in the proceeding and remained silent as to any supposed inconsistency in Mosher's position.

Being helped and not hurt by the small salvage on its debt realized by Mosher in the reorganization proceeding and thus being in no position to assert estoppel, Ward says that the statutory scheme of distribution with respect to partnership and individual debts and creditors was not followed by the bankruptcy court in the Chapter XI proceedings, as if Ward may assert a kind of pro bono publico position which it cannot assert in its own interest. But this statement comes wholly out of thin air. There is simply nothing in the record, as long as the record is, to indicate any disturbance of the statutory scheme of distribution.

But the basic answer to the claim of estoppel is that no inconsistency exists between Mosher's claim in the

reorganization proceeding and its claim here. It is simply *not* true that Mosher's claim in the reorganization proceeding was asserted as an individual obligation of IMI created by its independent undertaking as opposed to IMI's obligation as a member of the IMI-Ward joint venture.

As shown in the findings (Nos. 52 and 53, Appendix B, page B21) and in the Opinion of the Court of Appeals (Footnote 10, Appendix A, page A9), the opposite is the truth. Throughout the reorganization proceeding Mosher's claim was identified as the *same* claim upon which liability was also asserted against Ward as a joint venturer with the debtor and against Union, Fluor and the sureties, with explicit reservation of rights against all obligors. Thus, the Court of Appeals:

> ". . . The result urged by Union and Ward can obtain only if it is required by some legal fiction for Mosher in its proof of claim against IMI explicitly reserved its rights against Ward, Union, Fluor, and the sureties.
>
> Thus, unlike the claimant in *Eads Hide & Wool Co. v. Merrill*, 252 F. 2d 80 (10th Cir. 1958), which is relied on by Ward and Union, Mosher did not in the bankruptcy proceedings elect the remedy of recovery against only one of the allegedly liable parties. Moreover, Mosher did not assume different positions as to the facts in that proceeding and in this. It is not for us to say whether the decision allowing Mosher's claim in the bankruptcy proceeding was correct. We do hold that Mosher's full disclosure and express retention of rights in that proceeding precluded an estoppel against Mosher in this litigation."

THE UNION PETITION

Union's Petition makes the same claim as Ward with respect to equitable estoppel. Like Ward, Union was a party to, and an important factor in, the IMI reorganization. Union received a large percentage of the stock of IMI issued upon its reorganization. Like Ward, it made no complaint in the Bankruptcy Court with respect to the distribution of stock to Mosher, and like Ward it has received the full benefit in the District Court's judgment of the value of the stock which Mosher received in the reorganization.

Like Ward, Union simply refuses to admit that the claim made by Mosher in the reorganization fully set forth the fact that its claim against IMI was *in its entirety the same claim* which Mosher asserted against Ward *as IMI's joint venturer*. This suit was pending in the District Court in Tucson at the time the reorganization proceeding was in progress and is identified by docket number in the Bankruptcy Court's judgment awarding the stock to Mosher.

Considering its full statement of the claim against all obligors and its reiterated reservation of rights against Ward *as joint venturer* and against Union and Fluor *for the same debt*, it is difficult to imagine how Mosher could have more effectively notified the Bankruptcy Court and all of the claimants therein of its position as a joint venture creditor.

Of course, it has long been the policy of the Bankruptcy Act to encourage claimants against the estate of bankrupts to participate in bankruptcy proceedings

notwithstanding that co-debtors exist who are also liable to the claimant for the same debt. This is embodied in Section 16 of the Bankruptcy Act (U.S.C., Title 11, Chapter 3, Section 34), which is also applicable in Chapter XI proceedings (U.S.C., Title 11, Chapter 11, Section 702).

One purpose of these provisions of the Bankruptcy Act is to protect co-debtors. The co-debtors, Ward and Union, have, in fact, been protected by these provisions here in that they have obtained the entire benefit of the distribution which Mosher obtained in the reorganization proceeding. If Mosher had not participated in the Chapter XI proceedings, Union and Ward would have lost the $52,170.62 credit which the judgment here allows them.

Union says that it should have had equitable relief against Ward on the ground that Union was a surety for Ward.

Upon the trial, and prior thereto, Union never admitted that it was a surety for Ward, but asked relief with respect to Ward only if Union were held to be a surety.

In view of the trial court's finding that Union's relationship to the debt was that of a direct obligor, not a surety, it would appear obvious the surety issue was, indeed, tried by the court and the court found that the relationship of principal and surety as between Ward and Union did not exist. Hence, the court properly dismissed the counterclaim.

Finally, Union attacks the awarding of prejudgment interest on the ground of supposed conflict with Arizona law. Certainly the well-reasoned Opinion of the Court of Appeals is a sufficient answer.

THE FLUOR PETITION

Like Union, Fluor simply will not face up to the finding that Mosher had a direct contractual relationship with Union and gave the written notice to Fluor required by 40 U.S.C. Section 270B. Thus, Mosher's relationship to Fluor and Union is variously described by Fluor as being indirect, and it is stated that somehow Mosher was not a materialman.

Fluor's characterization of the essence of the judgment against Union as being one of "secondary liability" is simply a misstatement of the Court's findings in an effort to invoke the rule of *Clifford F. MacEvoy* v. *U. S.*, 1944, 322 U. S. 102, 64 Sup. Ct. 890, 88 Law. Ed. 1163, which would apply only if Mosher did *not* have a direct contractual relationship with Union.

Fluor laments that this is a situation in which it would have been difficult or impossible for the prime contractor to protect himself.

This can only mean that Fluor could not protect itself because Union refused to recognize the contractual relation, and Mosher had to file suit in order to substantiate it. Thus, the rights of a materialman having direct contractual relationship with a first-tier subcontractor should be forfeit merely because the first-tier sub-contractor disputes the contractual relationship.

From a practical standpoint, in the unlikely event that Fluor felt ill at ease as to the financial ability of Union to discharge Union's obligation, Fluor "could easily have protected itself by requiring appropriate security from Union." (Opinion, Appendix A, page A11.)

Secondly, Fluor complains of the allowance of prejudgment interest while admitting that state law is applicable to interest on Miller Act claims. Fluor, like Union, takes the Court of Appeals to task, and is best answered by the carefully considered Opinion of the Court of Appeals.

In respect of prejudgment interest, Fluor misstates the facts both directly and by innuendo as to the credit granted to it equal to the value of the stock received by Mosher in the IMI reorganization.

The fact is, Mosher did concede that the value of the stock should be credited against the judgment, and the only question was the value of the stock on the date of issue. Fluor, by quoting portions of the transcript, attempts to make it appear that Mosher was desperate to obtain a stipulation as to the value of the stock. The fact is, the defendants stipulated to the value without in any way being pressured to do so by the Court, and the stipulated value unquestionably was approved by the defendants as being greater, or certainly no less than testimony would have established.

In the vernacular, Fluor's position is as follows: "Mosher, you have, through arduous, diligent, and ex-

pensive litigation in the reorganization of IMI, which was also obligated for this debt, obtained and credited to our account the sum of $52,170.62. As a result of your obtaining this credit for our account, we are not liable to you for some $100,000.00 of prejudgment interest which otherwise would be absolutely and conclusively due to you under the law of Arizona because of our refusal to pay the sum which we owed you and the lengthy delay which resulted from our refusal."

Finally, Fluor cites as being in conflict with the Opinion of the Court of Appeals *Millers' National Ins. Co.* v. *Wichita Flour M. Co.*, 257 F. 2d 93 (C.A. 10, 1958), which allowed the payment of interest after an otherwise uncertain claim was rendered certain by a stipulation at the trial.

As the Court of Appeals has pointed out, there was clearly no doubt as to the qualification of Mosher's entire claim for prejudgment interest prior to the date upon which the stock was issued to Mosher in the Chapter XI reorganization, so that the question in this case is whether the receipt of the stock renders unliquidated an otherwise liquidated claim, whereas, in the *Millers' National Insurance* case, the claim itself was never liquidated until the stipulation occurred.

In this case it was not the stipulation which permitted the imposition of prejudgment interest. It was the claim itself, and the stipulation as to value (or had the parties not stipulated, the value which the Court would have found from testimony relating thereto) merely de-

creased the obligation of the judgment debtors and saved them from interest pro tanto after the date of receipt of the stock.

CONCLUSION

For the reasons stated, respondents pray that no writ of certiorari issue.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Ninth Circuit.

FLUOR CORPORATION, LTD., et al., UNION TANK CAR COMPANY, WARD INDUSTRIES CORPORATION,
Appellants and Cross-Appellees,
vs.
UNITED STATES OF AMERICA, ex rel. MOSHER STEEL COMPANY,
Appellees and Cross-Appellants.

No.21,307
No.21,307A
No.21,307B
No.21,307C

[January 6, 1969.]

Appeal from the United States District Court for the District of Arizona.

Before: HAMLIN, BROWNING, and ELY, *Circuit Judges.*

BROWNING, *Circuit Judge:*

The district court rendered judgment in favor of Mosher Steel Company and against the various appellants for prices agreed to be paid for materials furnished and services rendered by Mosher in the fabrication of steel used in the construction of missile launch facilities in Arizona and California.[1] We affirm the trial court's judgment except as it denied prejudgment in-

[1]Prior litigation in this court arising out of these projects is reported in *Dragor Shipping Corp.* v. *Union Tank Car Co.*, 361 F. 2d 43 (1966); 371 F. 2d 722 (1967); 378 F. 2d 241 (1967).

terest. As to this, we reverse and remand for further proceedings.

Appellants strongly attack many of the trial court's findings. We have, therefore, examined the record with care. We find substantial conflicts in the testimony and the documentary evidence, and even stronger differences in the construction that the parties urge should be placed on events leading to the litigation and the inferences that should be drawn from them.[2] We have not asked ourselves whether we would have resolved the conflicts and ambiguities as the trial judge did, or whether we would have drawn the same inferences. *United States* v. *Real Estate Boards*, 339 U. S. 485, 495-96 (1950). We have, however, satisfied ourselves that upon an examination of the entire evidence we are not "left with the definite and firm conviction that a mistake has been committed" in any of the trial court's findings. *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 395 (1948); see *Commissioner* v. *Duberstein*, 363 U. S. 278, 291 (1960). We therefore accept the trial court's findings, and base the statements of fact in this opinion upon them.

Fluor Corporation, Ltd., was the prime contractor for the construction of the Arizona launch facilities, and the insurance company appellees were sureties on Fluor's performance bond. Matich Bros. and M. M. Sundt Construction Corp., who are not parties to this litigation, were the prime contractors for the California launch facilities.

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[2]The parties are well aware of these conflicts and differences; they have explored them in great detail in their briefs. No useful purpose would be served by publishing them here.

Fluor and Matich & Sundt entered into separate first-tier subcontracts with Union Tank & Mfg. Co.[3] Union, in turn, entered into second-tier subcontracts for steel fabrication work with IMI-Ward, a joint venture created by Idaho-Maryland Industries Inc. and Ward Industries Corporation.

When IMI-Ward fell behind schedule in the performance of its subcontract, Union, on October 10 or 11, 1961 instructed an IMI-Ward official to "farm out" the steel fabricating work, and approved the selection of Mosher to perform it. Because the IMI-Ward official did not think Mosher would accept an IMI-Ward purchase order, Union agreed that if a satisfactory contract could be worked out with Mosher, Union would give Mosher a Union purchase order.

On October 13, the IMI-Ward official negotiated a detailed contract with Mosher for the required work. As anticipated, Mosher would not accept IMI-Ward's credit. The IMI-Ward official then advised Mosher that Union purchase order would be issued. On October 16, Mosher set out the agreed-upon terms in a letter addressed to the IMI-Ward official. That official signed the letter on behalf of Union and sent copies of the executed writing to Union. Mosher then began performance of the work.

Union told Mosher on October 23 that Union's purchase order would be issued within two or three weeks, and that the October 16 letter would serve as an interim purchase order until the formal purchase order

[3]Union acted principally through a division known as Graver Tank & Mfg. Co., and the trial court's findings refer to "Union" and "Graver" interchangeably.

could be mailed. Thereafter, on October 31, IMI-Ward asked Mosher, as a matter of accounting convenience for IMI-Ward, to change the designated customer on the job from Union to IMI-Ward, and to accept IMI-Ward purchase orders in place of those of Union. Mosher agreed, provided Union would be responsible for payment.

IMI-Ward sent Mosher two purchase orders on November 3 covering the work to be done. Mosher informed Union that completed material would not be shipped until Mosher received confirmation that Union would be responsible for payment.

On November 15, after securing IMI-Ward's approval, Union advised Mosher that Union would pay Mosher directly and deduct the payments from the amounts Union was to pay IMI-Ward under the latter's subcontract.[4] Mosher understood, and Union intended Mosher to understand, that its commitment extended to all the work covered by IMI-Ward's purchase orders of November 3. Upon receiving Union's commitment, Mosher changed the customer's name from Union to IMI-Ward, completed the work, and delivered the fabricated steel to the job sites.

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[4]The commitment was given orally. Union told Mosher that it would be confirmed by a subsequent letter. Although the letter was prepared by Union, it was not sent because Mosher continued to make shipments without it. Union argues that the sending of this letter was intended to be condition precedent to the formation of a contract, and that the trial court's finding to the contrary is clearly erroneous. We think the finding is supported by evidence from which the trial court could conclude that the promised letter was intended to be a written confirmation of an agreement already reached. *Merritt-Chapman & Scott Corp.* v. *Gunderson Bros. Eng'r Corp.*, 305 F. 2d 659, 664-65 (9th Cir. 1962), upon which Union relies, is inapplicable for this reason.

On February 2, 1962, IMI filed a voluntary petition under Chapter 11 of the Bankruptcy Act. Mosher submitted a proof of claim in these proceedings, and it was issued IMI stock under a plan of reorganization. Except for this stock, Mosher was not paid for its work.

The district court gave judgment against Union, finding that the commitment Union gave Mosher on November 15 and Mosher's completion and delivery of the work thereafter created a contract between Union and Mosher obligating Union to pay Mosher directly. Judgment was rendered against Fluor and its sureties under the Miller Act, 40 U. S. C. § 270.[5] The district court entered judgment against Ward on the ground that IMI-Ward's November 3 work orders and Mosher's fabrication and delivery of material pursuant to such orders created a contract between Mosher and IMI-Ward obligating Ward to pay Mosher in accordance with the terms and conditions of those orders.

Union contends that Mosher performed the work for IMI-Ward; that Union's agreement, if any, was only a guarantee to pay Mosher if IMI-Ward did not; and, being oral, this agreement to answer for the debt of another was unenforceable under the Statute of frauds.

Ward, on the other hand, contends that the only viable contract was an oral agreement between Mosher and Union arising on October 13, binding Mosher to perform the work and Union to pay for it. If there was a November agreement between Mosher and IMI-Ward, Ward argues, it required nothing of Mosher

[5]Since Fluor was not involved in the California project, the judgment against Fluor and its sureties was limited to the amount due for materials used in the construction of the Arizona facilities.

which Mosher was not already obligated to do under its October agreement with Union, and, therefore, any promise by IMI-Ward was not supported by consideration. Furthermore, the only consideration for which Mosher bargained was Union's unconditional promise to pay Mosher directly. Consequently, any promise by IMI-Ward was not bargained for and hence was unenforceable under our decision in *Colorado Nat'l Bank of Denver v. Boehm*, 286 F. 2d 494 (1961).

As we read the district court's findings, the court determined that *both* Union and IMI-Ward assumed direct obligations to pay Mosher for the work. IMI-Ward contracted directly with Mosher to have Mosher perform the work described in the November 3 work orders in return for payment by IMI-Ward of the prices fixed in those orders. This agreement was subject, however, to the condition precedent that Union also agree to be directly liable for payment. When Union agreed to pay Mosher, it became directly bound to Mosher. Union's promise also satisfied the condition precedent to the direct contractual obligations between IMI-Ward and Mosher.[6]

In view of Union's obligations under its subcontract with Fluor and Matich & Sundt, Union had a substantial interest in assuring performance of the work by Mosher. As the district court found, "in agreeing to pay Mosher directly, [Union] . . . acted primarily to protect

[6]Ward argues that no agreement arose because Mosher rejected an element of IMI-Ward's initial offer, namely, that IMI-Ward's credit be substituted for that of Union. There was substantial evidence supporting the trial court's findings that IMI-Ward agreed to Mosher's counter-offer to accept IMI-Ward work orders and to substitute IMI-Ward for Union as the account customer if Union would agree to pay for the work.

and advance its own interests under its subcontracts. . . ." Since Union's promise to pay was a direct and original undertaking rather than a collateral promise to pay IMI-Ward's debt, it was not within the Statute of Frauds, even though IMI-Ward was also obligated to pay for the work. *Holmes* v. *Suffrin*, 198 Ill. App. 45 (1916); *Peters* v. *Raven*, 159 Ill. App. 122 (1910); *Leisman & Co.* v. *Otto*, 64 Ky. (1 Bush) 225 (1866); *cf. Granite City Lime & Cement Co.* v. *Board of Educ. of School Dist. 126*, 203 Ill. App. 134 (1916). See 4 Corbin on Contracts § 926, p. 705.[7]

As to Ward's argument that any promise made by Ward to Mosher in November was without consideration, because of Mosher's pre-existing contractual obligation to perform the same work for Union, it should be noted that the district court did not conclude that a Union-Mosher contract arose in October. Even if such a prior Union-Mosher contract existed, IMI-Ward's subsequent promise would still have consideration. Under the arrangement finally agreed to, Mosher, at IMI-Ward's solicitation, undertook the additional obligation to designate IMI-Ward, rather than Union, as the customer, and to accept the IMI-Ward purchase orders. These new undertakings were sufficient to support IMI-Ward's promise to pay.[8]

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[7]Union also contends that its commitment was limited to materials produced for use in constructing the Arizona launch facilities. Although the testimony of one witness might be read as supporting the limitation for which Union argues, as Mosher points out, there was other evidence supporting the trial court's finding that Union's commitment covered payment for all of the work Mosher was to do—whether used in construction of the Arizona facilities or those in California.

[8]The basis for IMI-Ward's interest in these arrangements is suggested by the district court's finding that the prices which IMI-Ward had agreed to pay Mosher for the work were lower than those which IMI-Ward would collect from Union for the work.

Ward's reliance upon *Colorado Nat'l Bank of Denver* v. *Boehm, supra,* 286 F. 2d 494, is also misplaced. Mosher's insistence upon a direct commitment from Union, does not mean that this was the only consideration for which Mosher bargained. Mosher also sought and obtained a promise of payment from IMI-Ward. The fact that IMI-Ward's promise alone was not enough to satisfy Mosher, or that Union's promise alone might have been sufficient, is irrelevant. *See Granite City Lime & Cement Co.* v. *Board of Educ. of School Dist. 126, supra,* 203 Ill. App. 134; *Peters* v. *Raven, supra,* 159 Ill. App. 122; Restatement of Contracts §§ 111, 113.

Ward contends that Ward is not liable even if IMI is, because the extension of credit or the delivery of goods to one member of a joint venture does not obligate the joint venture. The cases upon which Ward relies involve the assumption of liability by a joint venturer beyond the scope of his authority to act for the joint venture.* Here, however, the district court concluded on the basis of findings supported by substantial evidence that IMI's acts were authorized by and performed on behalf of the IMI-Ward joint venture.

Both Union and Ward argue that because Mosher filed a claim in the IMI bankruptcy proceedings representing that the amount due Mosher was an unsecured independent obligation of IMI, and because Mosher accepted a distribution of the stock of the reorganized debtor on the basis of this claim, it is estopped from asserting that Union and Ward are liable. The result

*See, for example, *Wreen* v. *Moskin,* 226 App. Div. 563, 235 N. Y. S. 405 (1929); *American Mut. Life Ins. Co.* v. *Hanna, Zabriskie & Daron,* 297 Mich. 599, 298 N. W. 296, 299 (1941); and *Matanuska Valley Bank* v. *Arnold,* 223 F. 2d 778 (9th Cir. 1955).

urged by Union and Ward can obtain only if it is required by some legal fiction for Mosher in its proof of claim against IMI explicitly reserved its rights against Ward, Union, Fluor, and the sureties.[10]

Thus, unlike claimant in *Eads Hide & Wool Co. v. Merrill*, 252 F. 2d 80 (10th Cir. 1958), which is relied on by Ward and Union, Mosher did not in the bankruptcy proceedings elect the remedy of recovery against only one of the allegedly liable parties. Moreover, Mosher did not assume different positions as to the facts in that proceeding and in this. It is not for us to say whether the decision allowing Mosher's claim in the bankruptcy proceeding was correct. We do hold that Mosher's full disclosure and express retention of rights in that proceeding precluded an estoppel against Mosher in this litigation.[11]

In addition to defending against Mosher's claim, Union filed a counterclaim alleging that if it were liable at all it would be as a surety only, and praying that Mosher be required to seek satisfaction first from Ward. In its findings and conclusions the trial court did not refer expressly to Union's counterclaim. When the omission was called to the court's attention, the court entered a judgment that Union "take nothing by its

[10]Mosher's claim in the bankruptcy proceeding stated: "Claimant corporation claims that Ward Industries Corporation, as joint venturer with the Debtor, and Union Tank Car Company through its division, Graver Tank & Mfg. Co., are also liable to claimant corporation for the entire said debt, . . . Claimant corporation's filing of the claim in this proceeding is made without prejudice to its rights against the said Ward Industries Corporation, and the said Union Tank Car Company . . . In addition . . . claimant corporation has claimed that Fluor Corporation Ltd. and its sureties are liable. . . ."

[11]Mosher will not obtain double recovery. In computing the amount of the judgment, the trial court deducted the stipulated value of the stock received by Mosher in the bankruptcy proceeding.

counterclaim." Union contends that the existence of a principal-surety relationship not only was admitted in Mosher's answer to Union's counterclaim but was established by the evidence, and that, in any event, the district court erred in disposing of the counterclaim without entering findings of fact and conclusions of law as required by Fed. R. Civ. Proc. 52(a).

The purpose of Rule 52(a) is satisfied if the trial court's findings are sufficient to afford a clear understanding of the ground upon which the court based its judgment. *Seligson v. Roth,* ..... F. 2d ..... (9th Cir. 1968). It is apparent to us that the trial court rejected Union's counterclaim because it found Union's relationship to the debt to be that of a direct obligor, not a surety. Contrary to Union's contention, Mosher did not admit in its pleadings that Union was merely a guarantor;[12] and, as we have said, the trial court's finding that Union agreed to a direct and primary obligation is not clearly erroneous.

On the basis of this finding we also reject the contention advanced by Fluor and its sureties that Mosher was not a "person having a direct contractual relationship with a subcontractor" of Fluor within the meaning of 40 U. S. C. § 270(b). We are not convinced that recognition of Mosher's claim will extend the coverage of the Miller Act beyond that intended by Congress, nor that the result will be to "impose liability on the pay-

[12]In its answer to Union's counterclaim, Mosher admitted that it had alleged in the complaint that Union was a surety, but Mosher also stated "the amended Complaint includes other counts and allegations as therein set forth." These "other counts and allegations" of Mosher's complaint asserted that Union was directly liable to Mosher for the debt. "A party may . . . state as many separate claims . . . as he has regardless of consistency . . ." Fed. R. Civ. Proc. 8(e)(2).

ment bond in situations where it is difficult or impossible for the prime contractor to protect himself." *MacEvoy v. United States*, 322 U. S. 102, 110 (1944). Fluor could easily have protected itself by requiring appropriate security from Union. *See Hill v. American Surety Co.*, 200 U. S. 197, 204-205 (1906); *Mankin v. Ludowici-Celandon Co.*, 215 U. S. 533, 540 (1910).

We turn to Mosher's cross-appeal from the portion of the judgment which denied prejudgment interest on the amount found to be due under the contracts.

There is some disagreement among the parties as to whether the governing law is that of the state of the forum (Arizona) or of the states in which the contracts were to be performed (Arizona and California). Since there is nothing to indicate that the relevant law of the two states differs, we have not concerned ourselves with the problem. The California rule is stated in section 3287, California Civil Code, "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . ." Arizona follows the same general rule.[13]

[13]The California statute was enacted in 1872, and states the common-law rule. Restatement, Contracts § 337(a). Arizona has not codified the rule, but it is followed by the courts of that state. *United States Fidelity & Guar. Co.* v. *California-Arizona Const. Co.*, 21 Ariz. 172, 186 Pac. 502, 509 (1920); *Palmcraft Dev. Co.* v. *Phoenix*, 46 Ariz. 400, 51 P. 2d 921 (1935); *Schwartz* v. *Schwerin*, 85 Ariz. 242, 250, 336 P. 2d 144, 149 (1959); *Feighner* v. *Clarke*, 2 Ariz. App. 286, 408 P. 2d 219, 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P. 2d 513 (1966) (in banc); *Betz* v. *Goff*, 5 Ariz. App. 404, 406, 427 P. 2d 538, 540 (1967).

A recent addition to the California statute provides that where an unliquidated contract claim is involved interest may be awarded, in the court's discretion, for some or all of the period between the filing of suit and entry of judgment. Calif. Stats. 1967, ch. 1230, § 1.

Cross-appellees argue that Mosher's damages were not "certain or capable of being made certain by calculation" prior to judgment because of the disputed value of the IMI stock which Mosher received in partial payment of its claim in the IMI bankruptcy proceedings. The dispute over the stock's value was not resolved until the parties stipulated to its worth during the course of trial.[14]

Clearly, this circumstance did not render the amount of Mosher's claim uncertain until it arose. At a minimum, therefore, Mosher was entitled to prejudgment interest on the whole amount owing under the contracts from the date it became due (thirty days after February 28, 1962) to the date Mosher received the stock in partial payment.

It is equally apparent that Mosher was not entitled to interest after the latter date upon the portion of his claim which had been paid. But uncertainty about the precise value of the partial payment should not bar Mosher from compensation for the continued loss of the use of the much larger balance remaining unpaid. Interest on the difference between the amount due Mosher under the contracts and the value of the stock as determined at trial should be allowed from the date the

[14]Cross-appellees also intimate that Mosher should be denied prejudgment interest because the issue of liability was disputed. The generally accepted rule is that uncertainty as to liability, as distinguished from uncertainty as to the amount of the damage, does not bar recovery of prejudgment interest. Restatement, Contracts § 337 (a), comment d. Despite disputed liability, prejudgment interest was awarded in both *Feighner* v. *Clarke*, 2 Ariz. App. 286, 408 P. 2d 219 222-23 (1965), *vacated on other grounds*, 101 Ariz. 334, 419 P. 2d 513 (1966) (in banc); and *Betz* v. *Goff*, 5 Ariz. App. 404, 406, 427 P. 2d 538, 540 (1967). California cases to the same effect are collected in 5 U. C. L. A. L. Rev. 262, 266 n. 28 (1958).

stock was received to the date of judgment. Although we have found no decisions directly on point, this result is supported by analogous authorities.

Thus, even though the existence of an unliquidated counterclaim or set-off necessarily puts the amount payable in doubt, it is well settled that it does not render the claim itself uncertain or deprive the claimant of the right to prejudgment interest.[15] If the unliquidated set-off or counterclaim is based upon a breach unrelated to the sum due under the primary claim, interest is allowed on the entire claim. The amount of the counterclaim or set-off as determined at trial is then deducted from this total. If, as in the present case, the unliquidated set-off or counterclaim constitutes a partial payment of the primary claim, interest is allowable on the balance due after deducting the amount of the set-off or counterclaim as determined at trial.[16]

The result we reach is also supported by the principle recently applied in *Coleman Eng'r Co.* v. *North American Aviation*, 55 Cal. Rep. 1, 420 P. 2d 713 (1967).

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[15] *Hansen* v. *Covell*, 218 Cal. 622, 631-32, 24 P. 2d 772, 775, 89 A. L. R. 670 (1933) (in banc); *McCowen* v. *Pew*, 18 Cal. App. 482, 483 *et seq.*, 123 Pac. 354, 355-56; *Hunt Foods* v. *Phillips*, 248 F. 2d 23, 26-27 (9th Cir. 1957) (Calif.). Other California decisions are collected in 14 Cal. Jur. 2d 79, 705-06, and 5 U. C. L. A. L. Rev. 262, 268, n. 37 (1958). *See also Mall Tool Co.* v. *Far West Equip. Co.*, 45 Wash. 158, 273 P. 2d 652, 663 (1954); *Sam Macri & Sons, Inc.* v. *United States*, 313 F. 2d 119, 129-30 (9th Cir. 1963); *American Sur. Co.* v. *United States*, 368 F. 2d 475, 479-80 (9th Cir. 1966); 5 Corbin, Contract § 1046, p. 286, § 1051, pp. 305-06.

"In short," Professor McCormick states, "it is the character of the claim and not of the defense that is determinative of the question whether an amount of money sued for is a 'liquidated sum.'" McCormick on Damages, § 54 p. 216 (1935).

[16] *Hansen v. Covell*, 218 Cal. 622, 631-32, 24 P. 2d 772, 775-76 (1933) (in banc); *Hunt Foods* v. *Phillips*, 248 F. 2d 23, 26-27 (9th Cir. 1957) (Calif.); and cases collected at 14 Cal. Jur. 2d § 79, pp. 705-06.

There, defendant argued that prejudgment interest was barred because a lesser amount of damages was awarded than plaintiff had originally demanded. The reduced claim resulted from the plaintiff's successful efforts in obtaining settlements with third persons and in salvaging materials. The Supreme Court of California held that under these circumstances uncertainty as to the amount due did not bar an award of prejudgment interest. It stated, "we are satisfied that reductions in damages due to plaintiff's efforts to mitigate damages should not preclude an award of prejudgment interest. If the rule were otherwise, a plaintiff might be encouraged to forego opportunities to mitigate damages so as not to jeopardize his right to prejudgment interest." Similarly, Mosher's right to prejudgment interest should not be denied because Mosher in seeking and obtaining partial payment from a joint obligor reduced the amount of its claim against cross-appellees.

The judgments are affirmed on the appeals and reversed for further consideration on the cross-appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

UNITED STATES OF AMERICA for the use and benefit of MOSHER STEEL COMPANY, and MOSHER STEEL COMPANY, *Plaintiffs*, *vs.* THE FLUOR CORPORATION, LTD., et al., *Defendants.*	No. Civil-1605 Tucson

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR ENTRY OF JUDGMENT.

This action having been tried upon the facts before the Court, sitting without a jury, the Court does hereby find the facts and states separately its conclusions of law thereon, and directs entry of judgment, as follows:

FINDINGS OF FACT.

1. Use-plaintiff, Mosher Steel Company (hereinafter "Mosher", is and was at all times material herein a corporation and a citizen of Texas. Defendant Fluor Corporation, Ltd., (hereinafter "Fluor"), is and was at all times material herein a corporation and a citizen of California. Defendants Federal Insurance Company, Vigilant Insurance Company, Insurance Company of North America, General Insurance Company of America, Seaboard Surety Company, America Re-Insurance Com-

pany, Employees' Re-Insurance Group, and General Re-Insurance Group (hereinafter "Sureties"), are and were at all times material herein respectively corporations and citizens of states other than Texas or Arizona. Defendant Union Tank Car Company (hereinafter "Union"), is and was at all times material herein a corporation and a citizen of New Jersey, having a principal place of business in Illinois. Graver Tank and Mfg. Company (hereinafter "Graver"), is and was at all times material herein a division of Union and not a separate entity. Defendant Ward Industries Corporation (hereinafter "Ward"), is and was at all times material herein a corporation and a citizen of Delaware, having a principal place of business in New York, and is sued herein by Mosher as a member of a Joint Venture composed of Ward and Idaho-Maryland Industries, Inc., (hereinafter "IMI"). None of the defendants at any time material herein had a principal place of business in either Texas or Arizona.

2. All acts, conduct, and documents of Graver, or relating to Graver, mentioned or described in these Findings are the acts, conduct, and documents of Union and relate to Union. The terms "Graver" and "Union" are interchangeable and both refer to and mean defendant "Union". (Statement of Uncontested Facts, ¶ 3.)

3. The matter in controversy between Mosher and defendants exceeds $10,000, exclusive of interest and costs; and Mosher's claim against defendants Fluor and Sureties, asserted in Count I of Mosher's Amended Complaint, is asserted under the Miller Act. (40 U. S. C. §§ 270a, et seq.)

4. The United States of America entered into a written contract dated May 29, 1961, with Fluor, whereby Fluor agreed to perform work and to furnish services, labor, equipment, and materials for the construction of certain missile launch facilities near Davis-Monthan Air Force Base, Tucson, Arizona. (Jt. Ex. 1 in evidence.)

5. In connection with the Davis-Monthan job (the contract described in Finding No. 4), defendants Fluor and Sureties executed a payment bond. (Jt. Ex. 49 in evidence.)

6. The United States of America entered into a written contract dated May 29, 1961, with Matich Bros. and M. M. Sundt Construction Corp., whereby Matich and Sundt agreed to perform work and to furnish services, labor, equipment and materials for the construction of certain missile launch facilities near Vandenberg Air Force Base, Lompoc, California. (Statement of Uncontested Facts, ¶ 10.)

7. On September 8, 1961, Fluor entered into a written subcontract with Union, acting by and through Graver, whereunder Union agreed to perform certain of the work and to supply certain of the labor, materials, and other items provided in Fluor's prime contract described in Finding No. 4 to be performed and supplied by Fluor upon the Tucson project. (Jt. Ex. 2 in evidence.)

8. On September 8, 1961, Matich Bros. and Sundt entered into a written subcontract with Union, acting by and through Graver, whereunder Union agreed to perform certain of the work and to supply certain of the labor, materials, and other items provided in Matich

Bros. and Sundt's prime contract described in Finding No. 6 to be performed and supplied by Matich Bros. and Sundt upon the Vandenberg AFB project. (Jt. Ex. 4 in evidence.)

9. On or about July 14, 1961, a document (Union Ex. 4 in evidence) captioned "Letter of Intent Preparatory to Formal Agreement" was executed by and between IMI and Ward, wherein Ward and IMI expressed their intention as more particularly specified in the document, to execute a joint venture agreement for the performance of work on a proposed subcontract to IMI under a letter of intent from Union. (Statement of Uncontested Facts, ¶ 13.)

10. On July 28, 1961, IMI and Ward executed a document (Union Ex. B in evidence), captioned "Joint Venture Agreement". (Statement of Uncontested Facts, ¶ 14.)

11. Thereafter, and prior to October 23, 1961, with Union's approval, IMI and Ward executed and entered into, as of July 28, 1961, a revised Joint Venture Agreement (Jt. Ex. 7 in evidence), creating the joint venture to be known as, and hereinafter referred to as "IMI-Ward".

12. On October 23, 1961, defendant Union, acting through Graver, entered into a written subcontract with IMI-Ward (Jt. Ex. 8 in evidence), under the terms of which IMI-Ward undertook and agreed to perform certain of the work and supply certain of the materials and other items provided in Union's subcontracts described in Findings Nos. 7 and 8, above, to be performed and supplied by Union upon the Tucson project and the Vandenberg AFB project. (Jt. Exs. 2 and 4 in evi-

dence.) The subcontract price provided in Jt. Ex. 8 in evidence to be paid to IMI-Ward is the sum of $8,525,-011.00, of which sum $7,971,293.00 is applicable to work of IMI-Ward at the Tucson job and the balance of $553,718.00 is applicable to the work at the Vandenberg AFB project.

13. Mosher brings this action against defendants Union, Ward, Fluor, and Sureties for $298,336.58, which it claims is owing to it for fabricating certain steel, for furnishing certain steel, and for freight charges relating to the delivery of steel, which steel was used and incorporated into the work at the Tucson project covered by Fluor's contract (Finding No. 4, Jt. Ex. 1 in evidence), Union's subcontract (Finding No. 7, Jt. Ex. 2 in evidence), and IMI-Ward's subcontract (Finding No. 12, Jt. Ex. 8 in evidence); and Mosher seeks in this action, also, to recover from defendants Union and Ward the sum of $22,716.96, which it claims is owing to it for fabricating and furnishing steel and for freight charges in connection with delivering steel, which steel was used in and incorporated into the work at the Vandenberg AFB project covered by Matich Bros. and Sundt's contract (Finding No. 6), Union's subcontract (Finding No. 8, Jt. Ex. 4 in evidence), and IMI-Ward's subcontract. (Finding No. 12, Jt. Ex. 8 in evidence.)

14. The revised Joint Venture Agreement (Jt. Ex. 7 in evidence) entered into between IMI and Ward expressly provides, *inter alia*, that the obligations of the joint venturers under the subcontract with Union (Jt. Ex. 8 in evidence) shall be joint and several; that all money, equipment, materials, supplies and other prop-

erty of any nature whatsoever required for or in connection with the performance of the IMI-Ward subcontract shall be held for the account of the joint venture; that their interests in any profits and their respective shares in any losses and liabilities that may result from the prosecution and completion of the work to be performed under and in connection with the subcontract with Union (Jt. Ex. 8 in evidence), and their interests in all property and equipment required by the Joint Venture in connection with such subcontract, shall be 50% each; that a Joint Venture Committee is established which shall have control of the Joint Venture and shall manage its affairs, determining all matters and questions in connection with IMI-Ward's performance of the subcontract with Union; that, subject to the control of the Joint Venture Committee, performance of the work required to be done under the sub-contract with Union shall be under the supervision of George J. Morton, Manager, whose authority to commit or bind IMI-Ward shall be limited to commitments related to the normal performance of the subcontract with Union; that IMI shall directly manage and be responsible to the Joint Venture for the production and installation of the work to be performed under the subcontract with Union, except that the Joint Venture Committee may assign the performance of other minor portions of the work to Ward, it being the intention of the parties that the work shall primarily be performed by IMI in facilities owned or operated by it; and that work and services performed by either IMI or Ward shall be done on the basis of the assumption and reimbursement by the Joint Venture of the actual cost of such work, including

overhead and general administrative expenses, but without profit.

15. At all times material herein, Denver Steel and Iron Works (hereinafter "D. S. I.") was a division of IMI (Ward Exs. A-1 through A-4 in evidence).

16. In June 1961, at a meeting held in Union's offices in Chicago, Sam Wilson, General Manager of D. S. I., was instructed by officers of Graver, including its president and Vice-President, as to a procedure which would be utilized in procuring raw steel on behalf of Graver for use in performing Graver's subcontract on the Tucson and Vandenberg AFB projects, under which procedure Wilson would negotiate for the steel with steel companies and advise the companies, when agreement as to price and delivery had been reached, that Graver's purchase order for the steel would be forthcoming. (RT 222, 231).

17. Pursuant to such procedures, Sam Wilson arranged for the purchase of raw steel to be fabricated under the IMI-Ward subcontract with Union. In the negotiations with the steel mills, Wilson always negotiated on the basis, and so advised the mills, that Graver would issue the purchase order for the steel. (RT 181, 222, 231.)

18. Prior to October 13, 1961, George Morton, Manager of IMI-Ward, was told by officers and employees of Graver that IMI-Ward was not on schedule and that Morton would have to expedite the subcontract work. (Morton Dep., Plt's. Ex. 39 for identification, pp. 11-13.)

19. The raw steel which was originally intended to be fabricated by IMI-Ward at D. S. I. was owned by Graver. (RT 181; Jt. Ex. 8 in evidence, ¶ 5, p. 4.)

20. Lionel Lancaster, Graver's Vice-President, on October 10 or 11, 1961, at Denver, instructed Sam Wilson of D. S. I., who was having problems completing steel fabrication in time to meet delivery requirements under IMI-Ward's subcontract with Graver, to farm out the fabrication of the raw steel to others in order to meet delivery (RT 185-6); and he further advised Wilson that if he should negotiate a satisfactory contract with Mosher for the fabrication, a Graver purchase order to Mosher would be forthcoming. (RT 188, 234). At this time, Wilson told Lancaster and Thomas D. Harle, Graver's Director of Purchases, that he didn't believe Mosher would accept an IMI purchase order and that he, Wilson, desired to give Mosher a Graver purchase order. Lancaster advised Wilson that a Graver purchase order would be forthcoming. (RT 187-188, 233.) Harle and Lancaster approved of Wilson's selection of Mosher as a fabricator. (RT 233.)

21. Wilson went to Texas and on October 13, 1961, on behalf of Graver, negotiated with Mosher the complete terms, prices, and conditions of a contract for Mosher to fabricate steel required for the Tucson project (RT 193-4), advising Mosher that a Graver purchase order would be issued to cover the work. (RT 74, 187). The matters agreed upon by Wilson and Mosher were reduced to writing by Mosher on October 16, 1961. The writing was signed by Mosher's Senior Contracting Engineer and transmitted to Wilson at Denver, who signed

it on behalf of Graver on October 20, 1961. Thereafter, Wilson mailed the executed writing to Mosher, who received it on October 26, 1961 (Plt's. Ex. 1 in evidence; RT 194). Wilson sent copies of Plt's. Ex. 1 to IMI at Los Angeles and Tucson, and to Graver at Tucson; and Wilson handed a copy of Plt's. Ex. 1 to Harle at Denver. (RT 194). Upon Wilson's return to Denver and before he received the October 16 letter (Plt's. Ex. 1 in evidence), Wilson told Harle of the agreement he had reached with Mosher's Burton and Mitchell at Dallas. (RT 235.)

22. On October 13, 1961, Wilson knew the credit reputation of IMI and felt the same would not be satisfactory to Mosher. (RT 191.) Mosher would not have accepted a purchase order on the credit of IMI because of its impaired credit rating known to Mosher from credit reports in its possession. (RT 438; Jt. Exs. 52 through 58 in evidence.)

23. On October 13, 1961, Mosher, through its Treasurer, Russell Moore, accepted the order placed by Wilson on that date to fabricate steel for Graver, and Mosher's shop order 66109 was marked open on October 17, 1961, showing Graver as the customer. (RT 351; Jt. Ex. 12 in evidence.)

24. Mosher, considering itself bound, began performance under the October 13, 1961, oral agreement and expended labor for engineering between October 18 and October 24, 1961. (RT 251.) Mosher's shop started making templates on October 23, 1961. Steel began to arrive in Houston from Graver on October 23, 1961, in railroad cars sent, freight collect, by Graver. (RT 285, 286.) Up

to November 16, 1961, Mosher had incurred in excess of $40,000 in costs for shop work, overhead and costs of fabricating Graver steel, including inbound freight. (RT 287.)

25. Harle, Graver's Director of Purchases and Expeditor for the Tucson job, telephoned Ralph Burton, Mosher's Vice-President on October 19, 1961, and arranged to meet with Burton at Denver on October 23, 1961. (RT 253.) At that meeting, the parties discussed the October 16 letter (Plt's. Ex. 1 in evidence) in detail, Harle advising Burton that Graver would issue its purchase order to Mosher within two to three weeks and that the October 16 letter would serve as an interim purchase order until a formal purchase order could be sent by Graver. Harle also advised Burton that Wilson had signed Plt's Ex. 1 in evidence and had returned it to Mosher at Dallas. (RT 253-258.) As Director of Purchases, Harle possessed and exercised authority to issue purchase orders for Graver. (RT 905.)

26. On October 19, 1961, Mosher received from Harle a written procedure of Union's regarding shipments of steel to Mosher. This document referred to Mosher's order No. 66109, the same number carried on the October 16 letter. (Jt. Ex. 60; Plt's. Ex. 1 in evidence.)

27. Prior to October 23, 1961, Harle had directed that raw steel be forwarded from D. S. I. to Mosher at Houston and that other steel be sent from the steel mills to Mosher at Houston. (RT 254, 285-286; Jt. Ex. 60 in evidence.) This steel was owned by Graver and was stenciled "Property of Graver Tank & Mfg." (RT 181, 905.)

28. Although prior to October 31, 1961, Union's Vice-President Lancaster, Director of Purchases Harle, and Senior Contract Engineer Branting knew that Wilson had undertaken to contract on behalf of Graver for Mosher to fabricate steel for the Tucson job and knew of the contents of Plt's. Ex. 1 in evidence (RT 253-258); Jt. Ex. 60 in evidence; Union Ex. G in evidence), no officer or employee on behalf of Union ever question with either Wilson or Mosher, Wilson's conduct in acting on behalf of Graver. (RT 199-200.) However, the Graver purchase order which Wilson had assured Mosher would be forthcoming (Finding No. 21) and which Harle had informed Mosher would be issued to it (Finding No. 25), never was issued or delivered to Mosher.

29. On October 31, 1961, Wallace Orr, Director of Contracts for IMI-Ward, and W. E. Holmes, Manager of Construction for IMI-Ward, by direction of George Morton, IMI-Ward Manager, came to Texas for the purpose of negotiating a contract between IMI-Ward and Mosher for the fabrication of steel to be used in the Tucson and Vandenberg AFB jobs. (RT 791.) During negotiations with Burton and Mitchell of Mosher, Holmes and Orr talked of ordering steel fabricated for the Vandenberg AFB job and asked if Mosher would change the Customer on the steel job which Wilson had negotiated in Graver's name (Plt's. Ex. 1 in evidence) from Graver to IMI-Ward, explaining that it would make matters much easier and simpler for them from an accounting standpoint if Mosher accepted the change and accepted an IMI-Ward purchase order. (RT 261-265.) Holmes and Orr stated that if the change

could be made, IMI-Ward would be the customer and they furnished IMI-Ward's address. (RT 88.) Holmes and Orr were told by Mitchell and Burton that only Russell Moore, Treasurer of Mosher, at Houston, could give approval for the requested change. Burton reached Moore by telephone and Moore stated that IMI-Ward would be accepted as purchaser provided Graver would be responsible for payment, which statement Burton passed on to Holmes and Orr. (RT 90, 264-265, 354.) Holmes and Orr stated they would look further into the matter and let Mosher know. (RT 90.)

30. Following his return to California from Texas, Orr caused the purchase orders which are Jt. Exs. 9 and 10 in evidence to be prepared by Frank J. Wright, purchasing man for IMI-Ward, and sent to Mosher. (RT 796-798, 863.) The purchase orders were received by Mosher in Dallas on November 10, 1961. At the time Wright prepared and signed the purchase orders, there were in existence no IMI-Ward purchase order forms and Wright utilized IMI purchase order forms intending to obligate IMI-Ward. (RT 825-826, 798.) Mosher did not enter any change in its shop order for the Tucson job nor did it enter any shop order for the Vandenberg job until November 16, 1961. (RT 90-93.) Mitchell, Mosher's Senior Contracting Engineer, held the purchase orders (Jt. Exs. 9 and 10 in evidence) on his desk in Dallas until November 16, 1961, when he transmitted them to Mosher's main office in Houston, where they were received on November 17, 1961.

31. On November 7, 1961, Harle, Graver's Director of Purchases, was in the Mosher offices in Houston and

was told by Moore, Mosher's Treasurer, that he would not release shipments of the steel which Mosher was fabricating until Mosher received confirmation that Graver would be responsible for payment for the material. (RT 354-355). Harle suggested to Moore that he should get in touch with the person who could give assurance of payment, John Page, Graver's Controller, in Chicago, and Harle reached Page by telephone and informed him of Mosher's requirement in order to release the steel shipments. Moore also talked to Page and told him that the steel would be shipped to the missile sites only upon an agreement that if Mosher was not paid within the terms of the sale, then Graver would have to be responsible for paying Mosher. (RT 355.) Page advised Moore that approval for carrying out Moore's request would have to be sought from Morton, Manager of IMI-Ward, and Page told Moore that he would get in touch with Morton and advise Moore of the result. (RT 356.)

32. Prior to this time, Page had learned that Mosher was demanding a guarantee by Graver of the entire account and had talked with Vernon John of IMI-Ward about it, Page telling John that a guarantee would be considered only on the written request of John which must include an agreement that any payment by Graver to Mosher could be withheld from IMI-Ward. (Union Ex. K in evidence.)

33. On November 13, 1961, Orr of IMI-Ward telephoned Moore and requested Moore to accept a purchase order solely on the credit of IMI-Ward. When Moore refused, Morton, IMI-Ward Manager, got on

the phone and made the same request, which was also rejected by Moore. Moore advised Morton to contact Graver's Controller Page to get Page's approval for Graver's paying Mosher for its work, and Morton stated that if these were Mosher's conditions he would have to give his approval to Page. (RT 357-360.)

34. On November 31, 1961, Vernon John, for IMI-Ward, addressed a letter to Page, Graver's Controller, authorizing Graver to pay Mosher's invoices which would approximate $225,000, after acceptance of Mosher's work by IMI-Ward, and to deduct the amounts of such payments from the total IMI-Ward subcontract price for its work on the Tucson and/or Vandenberg AFB sites. (Jt. Ex. 26 in evidence.) Page had requested John to write him a letter of this nature. (RT 737-738.) John's letter was not received in Page's office until December 11, 1961, by which date Page had left his office permanently; but Harle, Graver's Director of Purchases, was shown a copy of the letter in IMI-Ward's California offices by Frank Wright of IMI-Ward on November 14, 1961. (RT 902.) On December 6, 1961, Harle wired Frank Wright that John's letter had not been received by Graver and asked that John mail immediately a duplicate of the letter, dated November 13, 1961. (Jt. Ex. 25 in evidence.)

35. On November 15,1961, Moore telephoned Page in Chicago and Page informed him that a clearance had been obtained from Morton for Graver's paying Mosher directly and informed Moore that Graver would make payment to Mosher directly, with deduction being made from the IMI-Ward contract. Page advised Moore, also,

that he would write Moore a letter to this effect. (RT 360-362.)

36. On November 15, 1961, and prior to the telephone conversation between Moore and Page, Harle sent Page a TWX (Jt. Ex. 45 in evidence) and had also talked with Page by telephone, with the result that Page had informed him that Page would take care of the problem relative to the credit. (RT. 913.) On the same day, Harle wrote a letter to Burton, of Mosher, stating that the letter from Page should be in Moore's hands on November 15 or November 16. In his letter to Burton, Harle gave specific instructions to Mosher regarding how the doing of the steel fabrication work and its delivery should be accomplished. (Jt. Ex. 50 in evidence.)

37. Prior to Page's conversation with Moore on November 15, 1961, Harle had informed Page that Mosher sought a guarantee of the whole account and that Page would have to resolve this problem. (RT 756-757.) When talking to Moore on November 15, 1961, Page knew that Mosher was requiring that Graver assure payment of the entire account. (RT 751-754.)

38. Following his telephone conversation with Moore on November 15, 1961, Page sent Mosher a telegram stating: "Please accept this wire as a guarantee of Idaho-Maryland payment to you on your November 16 shipment. Complete details will follow in letter early next week." (Jt. Ex. 22 in evidence.) When Page informed Moore on the telephone that he would write a letter (Finding No. 35), he intended Moore to understand that the letter was to relate to the entire fabrication job, not just the first shipment. (RT 746-748,

752.) By the letter mentioned in the second sentence of the November 15 telegram to Moore (Jt. Ex. 22), Page intended Moore to understand that the letter would be one concerning the entire account. (RT 750.)

39. On November 16, 1961, by authorization of Moore, Mosher's Treasurer, Mitchell entered the supplements required to Mosher's shop order 66109 to change the customer's name on the order from Graver to IMI, with credit on the order marked "Open" and shipments to be made to Graver at Tucson. At the same time, Mitchell also entered shop order 66146 to IMI to cover the fabrication of the Vandenberg work. (RT 92-93; Jt. Exs. 13 and 79 in evidence.) By reason of Moore's telephone conversation with Page on November 15, 1961, and the telegram from Page of that date, Moore understood and had reason to understand that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10 in evidence. Moore authorized the supplement to shop order 66109 and the entry of shop order 66146 by reason of that understanding; and he permitted the release and shipment of the steel fabricated by Mosher pursuant to Jt. Exs. 9 and 10 upon that understanding. Had it not been for Page's statement to Moore on November 15 and Page's telegram of November 15, Mosher would not have accepted either IMI or IMI-Ward as its customer and it would not have proceeded with the work pursuant to Jt. Exs. 9 and 10 in evidence.

40. In agreeing to pay Mosher directly, Graver, through Page, acted primarily to protect and advance its own interests under its subcontracts with Fluor and Matich Bros. and Sundt (Jt. Exs. 2 and 4), because it

had a definite stake in seeing to it that the fabricated steel came to the Tucson and Vandenberg sites.

41. After November 16, 1961, pursuant to the terms of Jt. Exs. 9 and 10 in evidence and to Graver's agreement to pay Mosher directly, Mosher fabricated the material described in Jt. Exs. 9 and 10 and delivered it to the Tucson and Vandenberg jobs. Graver supplied 1200 tons of the steel which Mosher fabricated for the Tucson job and 90 tons of the steel which Mosher fabricated for the Vandenberg job. In addition, Mosher supplied from its own stock 165 tons of steel which it fabricated for the two jobs. In connection with the fabrication and delivery of this steel, Mosher expended $18,054.35 for inbound freight charges on steel shipped to it freight collect by Graver and $46,066.92 for outbound freight charges. (Jt. Exs. 9 and 10 in evidence; RT 287, 377-379,905.) Computed in accordance with the prices and terms contained in Jt. Exs. 9 and 10 in evidence, Mosher's charges and invoices for the steel fabricated and delivered to the Tucson job totalled $298,336.58 and for the steel fabricated and delivered at the Vandenberg site $22,712.96. (Jt. Ex. 14 in evidence.)

42. Pursuant to the purchase orders which are Jt. Exs. 9 and 10 in evidence, Mosher furnished items of work which were required to be furnished by IMI-Ward under its subcontract with Graver. (RT 555.) The prices provided in Plt's. Ex. 1 in evidence and Jt. Exs. 9 and 10 in evidence to be paid to Mosher for doing the steel fabrication were lower than the prices which IMI-Ward quoted to Graver in bidding for the subcontract with Graver. (RT 242-243.)

43. IMI had no subcontract from IMI-Ward to perform, in its own behalf, any of the work contemplated by the IMI-Ward subcontract with Mosher (RT 677; Union Ex. CCC-1 for identification, pp. 136-139; Jt. Ex. 7 in evidence); and the work IMI did on the Tucson and Vandenberg sites was performed solely pursuant to the Joint Venture Agreement. (Jt. Ex. 7 in evidence.) Mosher, in all its acts and dealings with regard to, or pursuant to, Jt. Exs. 9 and 10 in evidence understood and acted upon the belief that the purchaser or other contracting party was IMI-Ward.

44. In the first few weeks of December 1961, Page left his office with Graver in Chicago and never returned to it, his employment with Graver being terminated on December 12, 1961. (RT 740; Plt's. Ex. 36 for identification, p. 348.) However, when Page was terminated, other officials of Graver, including Feurt, Manager of Construction Accounting, and Trytten, Acting Controller, knew of the existence of IMI-Ward's letter to Page authorizing Graver to pay Mosher's invoices (Jt. Ex. 26 in evidence), and knew that Page had informed Moore that Graver would make payment directly to Mosher and that Page would write Moore a letter to this effect. They knew, also, that Mosher was going ahead on the work described in Jt. Exs. 9 and 10 in evidence in reliance upon its understanding from Page's assurance on the telephone and his telegram that Graver would pay Mosher directly for all the work described in Jt. Exs. 9 and 10 in evidence. In fact, immediately after Page was terminated, these officials began the preparation of procedures for the direct payment to Mosher

of its invoices and they drafted a letter such as Page had promised Moore he would write, to be sent to Mosher guaranteeing payment of all amounts which should become due to Mosher for steel furnished to IMI-Ward for the Tucson and Vandenberg jobs. (Plt's. Ex. 36 for identification, pp. 450, 451; Jt. Ex. 24 in evidence; Jt. Ex. 21 in evidence.) The letter (Jt. Ex. 21 in evidence) was never executed or sent to Mosher because Lancaster, Graver's Vice-President, pointed out that Mosher was proceeding with the steel shipments and suggested that the matter of a written guarantee be deferred until it was requested by Mosher and then be given on a "separate shipment basis." (Jt. Ex. 24 in evidence.)

45. After the execution of the subcontract between Union and IMI-Ward (Jt. Ex. 8 in evidence), IMI-Ward assigned all invoices arising out of the subcontract to the United California Bank at Los Angeles, California. Notice of such assignment was given to Union and a copy of the assignment was recorded in the office of the County Recorder of Los Angeles County, California (Union Exs. MM and KK in evidence); however, there is no evidence in the record that Mosher was given or ever obtained from any source prior to the institution of this action, notice of the assignment.

46. In December 1961, Frank Wright, Purchaser for IMI-Ward, advised Moore, of Mosher, that Mosher's invoices theretofore issued to IMI-Ward were not billed by sites and levels. Mosher then rebilled and sent new invoices to IMI-Ward, completing this task on January 19, 1962. (RT 366-367.)

47. On February 2, 1962, IMI filed a voluntary petition under Chapter 11 of the Bankruptcy Act in the United States District Court, Southern District of California, Central Division, No. 137024-WB. On February 5, 1962, IMI, as the debtor in possession of its assets, filed an application to turn over possession of a certain manufacturing facility which it owned in Tucson, Arizona, to Graver under certain letter agreements dated February 1, 1962, and February 5, 1962. (Statement of Uncontested Facts, ¶ 17.)

48. The letter agreements of February 1 and February 5, 1962, were approved by the Referee in Bankruptcy on February 5, 1962, and IMI was authorized to accept Graver's offer in the letter agreement of November 5, 1962, and to turn over its Tucson facility to Graver. (Statement of Uncontested Facts, ¶ 18.)

49. Mosher's charges for work performed pursuant to Jt. Exs. 9 and 10 in evidence and delivered after February 2, 1962, are in the approximate sum of $55,000. (RT 384.)

50. Union caused to be prepared for presentation to the Referee in Bankruptcy in the IMI Chapter 11 proceedings, certain documents (Union Exs. ZZ, NNNN and PPPP in evidence) relating to Union's claim against IMI. The documents relate to the Tucson job and to the status, as of February 2, 1962, of the work subcontracted by Union to IMI-Ward. (RT 625-627.)

51. On March 20, 1962, Mosher sent to Fluor, by registered mail, the original of the letter and the statements and invoices which are part of Plt's. Ex. 24 in evidence.

52. In August, 1962, Mosher filed its proof of claim in the Chapter 11 proceedings of IMI, claiming that the debtor, IMI, was indebted to it for $22,716.96 for steel fabricated and delivered and furnished at Vandenberg and for $298,336.58 for steel fabricated, delivered and furnished at Tucson. The claim was filed as an unsecured claim, as qualified in paragraph 10 thereof, wherein Mosher alleged that Ward, as joint venturer with IMI, Union, and Fluor and its sureties were also liable to Mosher for the entire debt of $321,053.54, and that the filing of the claim was without prejudice to its rights against Ward, Union, and Fluor and its sureties. (Union Ex. E in evidence.)

53. On December 31, 1963, the Referee, pursuant to a plan of arrangement, ordered issued to Mosher in settlement of its claim against the debtor, IMI, certificates for 642,107 shares of IMI stock. (Union Ex. D in evidence.) Thereafter, IMI changed its name to Allied Equities Corporation and the stock was actually issued in a 1 to 20 "reverse split" (Jt. Ex. 39 in evidence), whereby Mosher received 32,105 shares of Allied Equities Corporation stock, the value of which has been established by stipulation of all parties to this action at $1.625 per share, or a total of $52,170.62. (RT 682.) The order for the issuance of such stock referred to a stipulation entered into between Mosher and the debtor, IMI, reiterating and reserving Mosher's claims against Ward, Union, and Fluor and its sureties, and referring to this action then pending in this Court. (Plt's. Ex. 26 in evidence.) Further, Mosher in the bankruptcy proceeding advised the Referee, and the Ref-

eree had notice, of Mosher's claims and position against Ward, Union, and Fluor and its sureties and of the pendency of this action by Mosher against Ward, Union, and Fluor. (Plt's. Ex. 30 in evidence, p. 4, ¶ 8, Findings of Fact, etc.)

CONCLUSIONS OF LAW.

1. The Court has jurisdiction of all parties to this action; and it has jurisdiction of the claims asserted herein by Mosher against defendants Fluor and Sureties by virtue of 40 U.S.C. § 270b, and of the claims asserted herein by Mosher against all defendants by virtue of 28 U. S. C. § 1332.

2. Mosher is not barred or estopped from recovering from defendants in this action by reason of its prosecution of its claim in the proceedings in the matter of the bankruptcy of IMI and its acceptance of the stock issued to it on its claim.

3. Mosher had a direct contractual relationship with Union and Mosher gave Fluor the written notice required by 40 U. S. C. § 270b.

4. IMI, in all its dealings with Mosher, was authorized to and did act for and on behalf of IMI-Ward. In furnishing, fabricating, and delivering the steel for the Tucson and Vandenberg jobs pursuant to the terms and provisions of Jt. Exs. 9 and 10 in evidence, Mosher did not deal with, nor rely upon the credit of, IMI, individually, but Mosher performed pursuant to its agreement with IMI-Ward. Ward, as a member of IMI-Ward, is obligated to Mosher by reason of Mosher's performance

of the terms and provisions on Mosher's part contained in Jt. Exs. 9 and 10, in the amount of $298,336.58 for steel furnished, fabricated, and delivered to the Tucson job and in the further sum of $22,716.96 for the steel furnished, fabricated, and delivered to the Vandenberg site.

5. IMI is not an indispensable party to this action.

6. Page's telephone conversation with Moore on November 15, 1961, and his telegram to Moore of the same date, together with Mosher's resulting action on November 16, 1961, and subsequently, with relation to Jt. Exs. 9 and 10 in evidence, constituted a contract and had the legal result of obligating Union to pay Mosher directly for all sums becoming due to Mosher under the terms and provisions of Jt. Exs. 9 and 10 for furnishing, fabricating, and delivering steel to the Tucson and Vandenberg jobs. Pursuant to the terms and provisions of Jt. Exs. 9 and 10, there became due to Mosher for furnishing, fabricating, and delivering steel to the Tucson job the sum of $298,336.58 and for furnishing, fabricating, and delivering steel to the Vandenberg job the sum of $22,716.96; and Union is liable to Mosher for these amounts.

7. The sending to Mosher of the letter mentioned in Page's telegram of November 15, 1961, was not intended by Page to be a condition precedent to Union's agreement or obligation to pay Mosher; but if it was, Union is estopped to raise the non-performance of the condition as a defense in view of the facts set out in Finding of Fact No. 44, supra.

8. In connection with Union's agreement to pay Mosher directly, Union and IMI-Ward agreed that Union might pay Mosher for its work, after acceptance of the work by IMI-Ward, and deduct Mosher's invoices from the contract price between Union and IMI-Ward. However, the existence of an indebtedness from Union to IMI-Ward against which Union might charge what it paid to Mosher was not a condition precedent to its obligation to pay Mosher.

9. Mosher fully carried out and performed each and all of its promises and agreements contained in Jt. Exs. 9 and 10 in evidence. IMI-Ward accepted Mosher's work performed under Jt. Exs. 9 and 10 and Mosher was entitled to IMI-Ward's approval for payment of Mosher's invoices for such work.

10. The assignment of invoices by IMI-Ward to United California Bank did not affect Mosher's rights against either Union or Ward.

11. No provision of the Statute of Frauds relied upon by Union herein constitutes a defense to the claims of Mosher in this action.

12. Fluor and Sureties are liable to Mosher under their payment bond executed and delivered in connection with the Davis-Monthan job in the sum of $298,-336.58.

13. Defendants are entitled to credit in the amount of $52,170.62 upon their respective obligations to Mosher, that amount being the agreed value of the stock received by Mosher upon its claim in the IMI bankruptcy proceedings.

14. Mosher is entitled to judgment herein against Fluor and Sureties in the sum of $246,165.96, and against Ward and Union in the sum of $268,882.92.

15. Inasmuch as Mosher's claims against all parties are unliquidated until judgment is entered, no interest is recoverable prior to the entry of judgment herein.

ORDER FOR JUDGMENT.

The clerk is directed to forthwith enter judgment herein, as follows:

In favor of Mosher and against defendants Fluor and Sureties, and each of them, for the sum of $246,165.96, together with interest thereon at the rate of 6% per annum from date of judgment until paid.

In favor of Mosher and against defendant Ward and Union, and each of them, for the sum of $268,882.92, together with interest thereon at the rate of 6% per annum from date of judgment until paid.

In favor of Mosher and against all defendants, and each of them, for Mosher's costs of suit herein.

Dated: May 24, 1966.

JAMES A. WALSH,
United States District Judge.

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FILED
MAY 2 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1177

THE FLUOR CORPORATION, LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION and GENERAL REINSURANCE CORPORATION,

Petitioners,

vs.

UNITED STATES OF AMERICA for the use and benefit of MOSHER STEEL COMPANY and MOSHER STEEL COMPANY.

Respondents.

Reply Brief Of Petitioners, The Fluor Corporation, Ltd. And The Sureties

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Attorney for THE FLUOR CORPORATION AND SURETIES, *Petitioners*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1177

THE FLUOR CORPORATION, LTD., FEDERAL INSURANCE COMPANY, VIGILANT INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, GENERAL INSURANCE COMPANY OF AMERICA, SEABOARD SURETY COMPANY, AMERICAN RE-INSURANCE COMPANY, EMPLOYERS REINSURANCE CORPORATION and GENERAL REINSURANCE CORPORATION,

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Reply Brief Of Petitioners, The Fluor Corporation, Ltd. And The Sureties

Respondent Mosher Steel Company's Response[1] for the first time raises the argument (Resp. Br. page 9) that the position of these petitioners is that ". . . somehow Mosher was not a materialman".

[1] Mosher filed a joint Response to three separate petitions for certiorari filed respectively by: The Fluor Corporation, Ltd., the prime contractor and the sureties on its Miller Act Bond; Union Tank Car Company, first-tier subcontractor; and Ward Industries Corporation, the surviving member of IMI-Ward second-tier subcontractor.

This argument demonstrates a total lack of comprehension of the position of these petitioners, or more likely, an effort to evade the issue by begging the question. The primary question presented for review (Petition p. 2) is as follows:

> "1. Is a prime contractor liable under the Miller Act to a materialman of a second-tier subcontractor because the first-tier subcontractor guaranteed payment to the materialman; or, in other words, is a mere promise of payment, by a subcontractor to a person not otherwise entitled to recover under the Act, a 'direct contractual relationship with a subcontractor' within the meaning of 40 U.S.C. §270(b)?"

Respondent's assertion to the contrary, our petition states and the record is clear that Mosher *was* a materialman to IMI-Ward, the second-tier subcontractor. For this reason, under *MacEvoy*[2] and many other cases, Mosher is not entitled to recover under the Miller Act.

Mosher makes no effort to discuss this question, from which this Court can only conclude that it concedes our contention[3] that the Congress intended that the Miller Act should extend only to persons *entitled to payment as materialmen, laborers or subcontractors,* and not to remote or collateral relationships.

Since Mosher claims its right to payment from Fluor, not as a materialman, but as the beneficiary of a promise of guaranty from Union, the second-tier subcontractor, it is not under the Act, and not entitled to

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[2] *Clifford F. MacEvoy v. U.S.* (1944) 322 U.S. 102, 64 S. Ct. 890, 88 L. Ed. 1163.

[3] Petition, 8, 9.

recover against the prime contractor and its sureties.

Nor does Mosher's discussion of the other questions presented by our petition assist the Court. Mosher does not even discuss the due process question, and fails to deal with the fact that the decision sought to be reviewed conflicts squarely with *Millers' National Ins. Co. v. Wichita Flour M. Co.*, 257 F.2d 93 (C.A. 10, 1958). These latter questions involve interest, and are dependent upon the primary question discussed above.

CONCLUSION

For the reasons stated herein and in their petition, the Fluor Corporation and the sureties respectfully pray that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

APR 30 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 1178

FLUOR CORPORATION, LTD., *et al.*, UNION TANK CAR COMPANY, WARD INDUSTRIES CORPORATION,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, *ex rel.* MOSHER STEEL COMPANY,

Appellees and Cross-Appellants.

REPLY BRIEF OF PETITIONER, WARD INDUSTRIES CORPORATION

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1178

FLUOR CORPORATION, LTD., *et al.*, UNION TANK CAR COMPANY, WARD INDUSTRIES CORPORATION,

Appellants and Cross-Appellees,

vs.

UNITED STATES OF AMERICA, *ex rel.* MOSHER STEEL COMPANY,

Appellees and Cross-Appellants.

REPLY BRIEF OF PETITIONER, WARD INDUSTRIES CORPORATION

I.

Mosher's Recovery Against IMI Individually in IMI's Individual Bankruptcy Completely Precludes Its Attempted Recovery Against Ward in This Action as a Member of the Joint Venture of IMI-Ward.

The inability of Mosher to respond to the substantial questions of law under the Bankruptcy Act presented by Ward's certiorari petition is vividly demonstrated by the following blithe and demonstrably erroneous assertions at pages 5-6 of its answering brief:

> "Ward claims an equitable estoppel against Mosher on the theory that an inconsistency exists between

> Mosher's status as a creditor of IMI in the Chapter XI reorganization of IMI and its status as a creditor of the IMI-Ward joint venture.
>
> * * *
>
> But the basic answer to the claim of estoppel is that no inconsistency exists between Mosher's claim in the reorganization proceeding and its claim here. It is simply not true that Mosher's claim in the reorganization proceeding was asserted as an individual obligation of IMI created by its independent undertaking as opposed to IMI's obligation as a member of the IMI-Ward joint venture."

It is impossible to comprehend Mosher's statement that "no inconsistency exists between Mosher's claim in the reorganization proceeding and its claim here." It is equally impossible to comprehend its further statement that its claim against IMI in the bankruptcy proceedings was *not* asserted "as an individual obligation of IMI . . . as opposed to IMI's obligation as a member of the IMI-Ward joint venture." On the contrary, under Bankruptcy law, Mosher could not possibly have filed a claim or recovered a judgment against IMI, if it were a creditor of the joint venture, and not a creditor of IMI individually. The following undisputed facts are totally dispositive of Mosher's claim against Ward as a matter of law:

(1) The bankruptcy of IMI was the individual bankruptcy of IMI alone. No petition in bankruptcy was ever filed by Ward or the joint venture of IMI-Ward.

(2) IMI was the owner of seven divisions located in California, Colorado and Arizona, 50% of the production of which represented individual contracts in which IMI was individually engaged. In connection therewith, IMI incurred substantial individual obligations and realized

substantial individual accounts receivable. Both the accounts receivable as well as the accounts payable were due and owing from and to IMI *individually* and were in no way connected with or related to the joint venture of IMI-Ward.

(3) Mosher filed its proof of claim in the individual bankruptcy of IMI as an individual creditor of IMI, and *not* as a creditor of the joint venture of IMI-Ward. *Had it filed its claim against IMI as a creditor of the joint venture of IMI-Ward, it could not lawfully have shared in the individual assets of IMI as an individual creditor of IMI pro rata with all other individual creditors of IMI.*

(4) In its proof of claim, Mosher swore that IMI, *individually,* was "justly and truly indebted to the plaintiff corporation for the sum of $321,053.54", the exact sum for which the present action was brought against Ward as a member of the joint venture. (Finding 52, Mosher Br., App. B. p. B-21)

(5) The final judgment entered by the Bankruptcy Court on December 31, 1963 allowed Mosher's claim as a creditor of IMI individually in full for the sum of $321.053.54. IMI was ordered to issue 642,107 shares of its capital stock to Mosher in full satisfaction and extinguishment of its individual claim. (Finding 53, Mosher Br., App. B, p. B-21) The value of those shares of stock was stipulated to be the sum of $52,170.62, approximately 16% of the amount of Mosher's claim. All other individual creditors of IMI were treated alike.

(6) Since the individual creditors of IMI were *not* paid in full, obviously no surplus remained of the individual assets of IMI which could possibly be applied to the claim of any creditor of the joint venture.

II.

The Alleged Liability of Ward as a Joint Venturer Is Entirely Different From the Obligation of Union Upon Its Separate and Independent Agreement With Mosher.

In its attempt to obfuscate the issues presented by Ward's petition, Mosher has indiscriminately lumped Ward, Union, Fluor and the Sureties together (Mosher Br., pp. 7-12). It has totally ignored the fact that the Mosher claim against Ward in this action was not based upon a separate and independent covenant. The *only* basis of Mosher's claim against Ward was Ward's relationship to the joint venture of IMI-Ward. Ward has been held liable to Mosher solely and only as an incident and consequence of partnership law.

Thus, the District Court ruled in its Conclusions of Law that "Ward, as a member of IMI-Ward is obligated to Mosher. . . ." (Conclusion 4, Mosher Br., App. B. p. B-22). The Circuit Court likewise ruled that Ward was liable because "IMI's acts were authorized by and performed on behalf of the IMI-Ward joint venture" (App. 8a).

On the other hand, Mosher's claim against Union was predicated upon a direct, express and individual promise and undertaking by Union to Mosher which was wholly separate from, and independent of, any obligation undertaken by the joint venture to Mosher. Indeed, the Court of Appeals ruled that the obligation undertaken by the joint venture to Mosher occurred subsequent to the independent agreement between Mosher and Union. (Appendix, p. 7a)

Consequently, the judgment of the Bankruptcy Court in favor of Mosher against IMI, as an individual obligor upon an individual undertaking by IMI, had nothing whatsoever

to do with Mosher's claim against Union, and its resulting claim against Fluor and the Sureties, excepting, solely, to reduce the amount thereof by the amount of its recovery in the bankruptcy proceeding. On the other hand, Mosher's recovery in the Bankruptcy Court as an individual creditor of IMI, sharing equally with all other individual creditors of IMI in the individual assets of IMI, is an absolute bar, under the Bankruptcy Act, to Mosher's claim in this action that the individual debt upon which it recovered against IMI was not an individual debt at all but a firm debt which entitles it to recover from Ward as an incident of partnership law.

Contrary to the opinion of the Court of Appeals herein, there is not an iota of difference between the facts in this case and the facts presented to the Tenth Circuit in *Eads Hide & Wool Co.* v. *Merrill*, 252 F. 2d 80. The only difference between the two is the inclusion in Mosher's proof of claim against IMI of a statement that the claim was being filed "without prejudice to its rights against the said Ward Industries Corporation" because the "claimant corporation claims that Ward Industries Corporation *as joint venturer with the debtor*, . . ." is "*also* liable to claimant corporation for the entire debt . . ."

It was not the function of the Bankruptcy Court to determine the propriety, sufficiency or validity of Mosher's claim against Ward as a member of the joint venture. The Bankruptcy Court was dealing solely and only with the issues submitted to it by Mosher as an individual creditor of IMI in IMI's individual bankruptcy proceedings. By the judgment rendered therein, Mosher established the juridically conclusive fact that the obligation created by the IMI purchase orders was an individual obligation of IMI and not an obligation of the joint venture of IMI-Ward.

The alleged "express retention of rights" in the bankruptcy proceedings to which the Court of Appeals referred in its opinion does not warrant and cannot justify the total destruction of the scheme of distribution embodied in the Bankruptcy Act, 11 U.S.C. § 23 (g), repeatedly enforced by this Court and the several Courts of Appeals. In the language of this Court in *Schall* v. *Camors*, 251 U. S. 239, 255, no claimed retention of rights, whether couched in the words "without prejudice" or otherwise, or any other legalistic stratagem or maneuver:

> ". . . can displace the equities of other creditors, recognized in the Bankruptcy Act, and *put petitioners in a position of equality with others who actually were creditors of the individual partners, and of preference over other firm creditors.* Reynolds v. New York Trust Co., 188 Fed. 611, 619, 620, 110 C.C.A. 409, 39 L.R.A. (N.S.) 391." (Itals. ours)

CONCLUSION

For all of the reasons stated herein and in its petition, Ward Industries Corporation respectfully prays that its petition for a writ of certiorari be granted by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1179

UNION TANK CAR COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA, EX REL., MOSHER STEEL COMPANY, FLUOR CORPORATION, LTD., ET AL., AND WARD INDUSTRIES CORPORATION,
Respondents.

REPLY BRIEF OF PETITIONER, UNION TANK CAR COMPANY.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1179.

UNION TANK CAR COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA, EX REL., MOSHER STEEL COMPANY, FLUOR CORPORATION, LTD., ET AL., AND WARD INDUSTRIES CORPORATION,

Respondents.

REPLY BRIEF OF PETITIONER, UNION TANK CAR COMPANY.

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1. No Fact Disputes Are Raised by the Certiorari Petitions.

The Union certiorari petition, and in our view the Fluor and Ward petitions as well, involve no "last-ditch effort to reopen fact disputes" (Mosher Br. 4). They rather present straight-forward legal questions which can be determined on undisputed documentary evidence without disturbing any fact findings below.

The Sec. 23(g) bankruptcy issues, for example, may be resolved with reference to little more than Mosher's proof of claim in the IMI bankruptcy (Union Ex. E; R. 1236, 676-9), the Referee's distribution order (Union Ex. D; R. 680-1), and the pleadings in the instant case (R. 268-80).

The inconsistency between Mosher's legal position in the bankruptcy proceeding and in the Courts below is further substantiated, not contradicted, by the District Court's finding that Mosher filed its claim *against IMI* and not the joint venture (Findings 52 and 53, Union Pet. App. B, p. 20).

Similarly, a purely legal issue is presented with respect to Union's status as a surety. The fact finding that Union was a co-obligor directly liable to pay one and the same debt as Ward (Finding 35, Union Pet. App. B, p. 14), did not warrant the automatic conclusion that no principal-surety relationship could exist between Ward and Union which relationship would entitle Union to equitable relief under Ariz. Rev. Stat. § 12-1642. Moreover, this question is again predicated upon, not contradicted by, the findings made by the District Court respecting the dual liability of Union and Ward (Findings 40 & 42, Union Pet. App. B, pp. 16, 17). Mosher's argument about re-opening complicated fact disputes therefore is a red herring intended to divert attention from the merits of the legal questions presented.

2. Mosher's Inconsistent Claims Secured for It a Distribution in Violation of the Bankruptcy Act, Sec. 23(g).

Mosher states that "Like Ward, Union simply refuses to admit that the claim made by Mosher in the reorganization fully set forth the fact that its claim against IMI was *in its entirety the same claim* which Mosher asserted against Ward *as IMI's joint venturer*" (Mosher Br. 7). Union most emphatically does so refuse to admit because Mosher's claims are not the same but are necessarily made different and distinct by the provisions of Section 23(g). Under that Section a "claim against IMI" must be based on an *individual* obligation of the debtor which, if established, authorized Mosher's payment out of individual assets of the

debtor's estate. A claim against the joint venture would constitute a partnership claim which would have entitled Mosher to payment out of joint venture assets—property which was non-existent in the IMI bankruptcy proceeding. Mosher did not file a proof of claim against IMI "as a joint venturer" although it did purport to reserve its rights against Ward in that capacity. Its actual proof of claim, asserted in the *individual* Chapter XI bankruptcy proceeding of Idaho-Maryland Industries, a Nevada corporation, Debtor, affirmed that IMI, *individually,* was "justly and truly indebted to the plaintiff corporation" (Finding 52, Union Pet. App. B, p. 20; R. 676).

Moreover, the inconsistency in Mosher's claim positions was in no way justified by the co-debtor provisions of Bankruptcy Act, Sec. 16, 11 U. S. C. § 34. That section merely provides that the liability of a person who is a co-debtor with a bankrupt will not be altered by the discharge of the bankrupt. It would have been applicable in the instant case had Mosher originally asserted in the IMI bankruptcy that IMI-Ward and Union were co-debtors and had sought recovery against IMI only in its capacity as a joint venturer. Had it maintained that position, Mosher most assuredly would have received no bankruptcy distribution but its claims against Ward as a joint venturer and against Union would not be barred by estoppel or by IMI's bankruptcy discharge.

3. The Decision Below Nullified the Arizona Statutory Remedy for Sureties.

Mosher merely reiterates the Court of Appeals' conclusion that Union, as a co-obligor with a "direct" liability to plaintiff, was necessarily precluded from being considered a surety within the meaning of the Arizona statute. Respondent, like the Court below, thereby assumes that Union's surety status depended upon the nature of its

obligation to Mosher rather than upon the relationship between Union and Ward with respect to the debt concerned. This position is maintained in the face of long-settled law holding that whether a party is a surety "depends not upon his relation to the obligee, the creditor, but upon his relation to the principal obligor, the debtor." 10 *Williston on Contracts* (3rd Ed. 1967), § 1211, p. 683.

Commenting on this issue, the Restatement authors observe in *Rest. Security* § 82, Comment h:

> ". . . Finally, a tripartite relationship [i.e., between co-debtors and creditor] involving a primary and secondary liability may arise in a variety of other situations in which the person, who in final analysis has a secondary liability, *nevertheless has contracted for a primary liability so far as the creditor is concerned* . . .
>
> "None of these situations belongs solely to the field of suretyship. They are properly included in such a category because of the application to them of many similar rules. *The most important of these rules relate . . . to the limitations upon the freedom of action of the creditor in dealing with the principal whenever he has knowledge of the existence of the tripartite situation.*" (Emphasis supplied.)

See also *Rest. Security* § 114 Comment a, stating that "Where the creditor deals with two persons as principals" but has knowledge of their surety relationship *inter se*, "he must take account of the relationship in his dealings with them."

The District Court's findings clearly support the conclusion that Mosher was aware of the surety relationship between Union and Ward from the inception of the transaction.* It found that when Orr offered joint venture pur-

* Note that A. R. S. § 12-1642 does not expressly require that the creditor have knowledge of the surety relationship as a condition to the surety obtaining statutory relief. Commenting on such statutes the Restatement authors observe, "Some states by statute require

chaser orders at the October 23rd meeting, Mosher agreed to accept them provided that Union would also be responsible for payment (Finding 29, Union Pet. App. B, p. 12). It also found that during the telephone conversation with Page, Moore insisted that Union pay Mosher directly in the event the joint venture did not pay within the terms of the sale (Finding 31, Union Pet. App. B, p. 13). Mosher thus had actual knowledge that as between the two obligors, Ward rather than Union should in the first instance pay for the work performed. When these circumstances are combined with the fact that Ward, as a joint venturer, had expressly agreed to indemnify Union on materialmen's claims (Jt. Ex. 8, R. T. 218) and had already received Union's payment for Mosher's work (See Union Pet. pp. 7-8), we submit that Union's position as a surety was uncontrovertibly established.

Petitioner thereby became entitled to relief in accordance with the equitable principles codified in the Arizona Statute. Ariz. Rev. Stat. § 12-1642 expressly provides that where several defendants are sued for a common debt, the court on application shall determine whether "one or more of the defendants are surety of the others" and in the event a surety relationship between them is found to exist, the court shall order that plaintiff "levy the execution first upon the property of the principal" before a levy is made upon the property of the surety. This statutory remedy extends to every form of suretyship "whether created by express contract or operation of law." See Ariz. Rev. Stat. § 12-1646. Comparable statutory provisions are also found in Texas where Mosher is situated, *Vernon's Texas Codes Ann.* (1968), *Business and Commerce Code*, §§ 34.01-34.05,

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a creditor in certain circumstances and at the formal demand of the surety to proceed first against the principal. The application of such statutes to sureties not known to be such at the beginning of the transaction with the creditor, or to sureties who have originally contracted as principals, is a matter to be determined by an interpretation of the particular statutes." *Rest., Security*, § 114, Comment d.

and in California where the Vandenburg work was performed, *West Ann. Calif. Codes* (1954), *Civil Code*, § 2845.

Commenting on this type of statutory provision in *State Athletic Comm.* v. *Mass. Bonding and Ins. Co.*, 46 Cal. App. 2d 823, 829, 117 P. 2d 75, 79 (1941), the California Appellate Court stated that it represented the "enactment of rules developed in equity to give relief from the common law doctrine which permitted the creditor to enforce remedies against the surety without reference to his rights against the principal." See also *Ferreis* v. *Matteson*, 21 Cal. 2d 437, 447, 132 P. 2d 476 (1942).

This was clearly the purpose for which Ariz. Rev. Stat. § 12-1646 was enacted, a purpose totally frustrated by the decision below.

CONCLUSION

For the reasons stated herein and in its petition, Union respectfully prays that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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